California Counties: Second-Rate Localities or Ready-Made Regional Governments?

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I. Introduction

The story is familiar to most Californians. Balkanization has exacerbated what are properly regarded as regional—as opposed to statewide or local—problems: crime, urban sprawl, socio-economic disparities, inefficient and uncoordinated transportation systems, housing shortages, insufficient open space and recreational facilities, inadequate water supply, and poor air quality.[1]

1. *See, e.g.*, Douglas R. Porter, *Tough Choices: Regional Governance for San Francisco,* URB. LAND 36-39 (Mar., 1992); CAL. CH. OF THE AM. PLAN. ASS'N, ACTION AGENDA FOR THE 1990S: A NEW APPROACH TO GROWTH MANAGEMENT AND REGIONAL PLANNING (mimeograph, Sacramento, 1991); Douglas R. Porter, *Regional Governance of Metropolitan Form: The Missing Link in Relating Land Use and Transportation, in* TRANSP. RSCH. BD., TRANSPORTATION, URBAN FORM, AND THE ENVIRONMENT, Special Report 231, at 63-80 (1991); Kenneth A. Brunetti, Note, *It's Time to Create a Bay Area Regional Government,* 42 HASTINGS L.J. 1103, 1116-23 (1991); David R. McEwen, *Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict,* 8 LOYOLA L.A. L. REV. 432, 433 n.7 (1975); GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA 3, 18-19 (Ernest A. Engelbert ed., 1961); CAL. COMM'N ON

Most Californians live in vast metropolitan areas. In the San Francisco Bay Area, more than six million people live in 7,000 square miles, divided into nine counties, covered by a patchwork of nearly 100 cities, and crisscrossed by more than 650 special districts.[2] Even with a dominant central city, and a large county, greater Los Angeles is equally complicated, more populous, much larger, and even more daunting.[3]

In planning circles, there is consensus that the "region" is the most relevant level for effective land use planning in California.[4] Nevertheless, in the overwhelming majority of cases, California's system of local government fails to match the regional model. Each of California's four types of local government—county, city, consolidated city-and-county, and special district—has subject matter jurisdiction exclusive of the others.[5] In fact, political and fiscal pressures encourage California local governments to compete, rather than cooperate with one another.

This is not a new phenomenon. During the Gold Rush, boosters of rival communities within the same region, like the cities of San Francisco and Benicia, competed to attract commerce and put their rivals under.[6] Well before California's post-World War II population explosion, city planners, elected officials, and political scientists began

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COUNTY HOME RULE, COUNTY GOVERNMENT IN CALIFORNIA: FINAL REPORT OF THE CALIFORNIA COMMISSION ON COUNTY HOME RULE 165 (1930).

2. *See* Brunetti, *supra* note 1.

3. Los Angeles County covers 4,060 square miles. *See* CALIFORNIA CITIES, TOWNS & COUNTIES: BASIC DATA PROFILES FOR ALL MUNICIPALITIES AND COUNTIES 496 (Edith R. Hornor ed., 1997). In 1996, it was home to an estimated 9.4 million people, of whom 3.6 million lived in the City of Los Angeles, 4.8 million in another 80 cities, and 1 million in unincorporated areas. *See id.*, at 235 (city), 495 (county). Within Los Angeles County there are also approximately 700 independent agencies, including 100 school districts. *See* WINSTON W. CROUCH, ET AL., CALIFORNIA GOVERNMENT AND POLITICS, at 249 (6th ed. 1977).

4. *C.f.* Younger v. County of El Dorado, 5 Cal. 3d 480, 498 n.20 (1971) ("*Younger I*") ("Indeed, it has been generally recognized that land use planning and environmental control often present problems of regional, statewide, national, or even world-wide concern.") (citations omitted). For a recent, scientific survey of California planning directors' opinions on regional government generally, and regional planning functions specifically, *see* Mark Baldassare, et al., *Possible Planning Roles for Regional Government: A Survey of City Planning Directors in California*, 62 J. AM. PLAN. ASS'N 17, 17 (1996) ("There are at least ten economic regions in the state."), *citing* RICHARD SYBERT & ANTHONY QUINN, THE REGIONS OF CALIFORNIA (Sacramento: Cal. Governor's Ofc. of Plan. & Rsch., 1992).

5. The *territorial* jurisdiction of special districts often overlaps with that of counties and cities.

6. *See, e.g.*, PAUL WALLACE GATES, LAND AND LAW IN CALIFORNIA: ESSAYS ON LAND POLICIES 109-12 (1992) (describing San Francisco-Benicia rivalry).

to call for a reform in California's system of local government.[7] Some improvements have come, whether through annexations, recodification of state laws, or amendments of the State Constitution.[8] Overall, these have been too little, too late.

As California's land use problems continue to intensify and become more complex, commentators continue to clamor for local government reform.[9] In all these efforts, some form of regional government has remained the Holy Grail.[10] Like the search for Christ's chalice, the quest for regional government has been uncertain and interminable. Sadly, both the Grail and regional government bodies may be largely mythical.[11]

Despite valiant efforts,[12] the recent push for regional government has stalled, just as it has in the past. It is hard to believe that more urban sprawl and other catastrophes[13] will inspire the California electorate to embrace regionalism when they have not done so to date.

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7. *See, e.g.*, Brunetti, *supra* note 1, at 1108 (recounting past efforts to create regional government in the Bay Area), *citing* JOHN C. BOLLENS, THE PROBLEM OF GOVERNMENT IN THE SAN FRANCISCO BAY REGION 65-94 (1948).

8. *See, e.g.*, Revision to California Constitution, Article XI, Approved by the Voters, June 2, 1970. Of course, one might credibly argue that the rewriting of Article XI merely strengthened Home Rule, especially for cities, thereby making it even harder to address regional problems. *See infra* part II.B.

9. *See, e.g.*, Brunetti, *supra* note 1.

10. *See, e.g.*, ANNALEE SAXENIAN, REGIONAL ADVANTAGE: CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (1994); Brunetti, *supra* note 1, at 1106 (1991); CROUCH, ET AL., *supra* note 3, at 268-69; STANLEY SCOTT & JOHN C. BOLLENS, GOVERNMENT: REGIONAL ORGANIZATION FOR BAY CONSERVATION AND DEVELOPMENT, 2 (1969); STANLEY SCOTT & JOHN C. BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA (1968); Ira Heyman, *Symposium: The San Francisco Bay Area—Regional Problems and Solutions*, 55 CAL. L. REV. 695, 698 (1967); GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1; Cal. Assembly Interim Comm. on Mun. & County Gov't, *Concepts in Metropolitan Government*, 6 ASSEM. INT. RPTS. 1957-1959 No. 9, 1, 7; BOLLENS, *supra* note 7; Planning Act of July 1, 1937, Cal. Stats. 1937, ch. 665, at 1817 (directing State Planning Board to divide State into regional planning districts, each with a regional planning commission appointed by Governor from nominees selected by boards of county supervisors); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 165-73.

11. There is some reality to regionalism. A few regional bodies in California have planning authority, like the California Coastal Commission, *see* CAL. PUB. RES. CODE §§ 30300-30355 (West 1996), the Bay Conservation and Development Commission ("B.C.D.C."), *see* CAL. GOV'T CODE §§ 66600-66682 (West 1997), and the Tahoe Regional Planning Agency ("T.R.P.A."). *See* CAL. GOV'T CODE §§ 67000-67132 (West 1997).

12. In the Bay Area, a recent failure was Bay Area 2020, set up at the end of 1989. *See* Brunetti, *supra* note 1, at 1104.

13. Of course, not every planner agrees that sprawl is bad. *See, e.g.*, Genevieve Giuliano, *The Weakening Transportation-Land Use Connection*, 6 ACCESS 3 (1995); Peter Gordon & Harry Richardson, *Gasoline Consumption and Cities: A Reply*, 56 J. AM. PLAN. ASS'N 342-45 (1989).

Some damage, like the destruction of prime agricultural land, is irreversible. It will be cold comfort for planners to say, "We told you so," once the San Joaquin Valley has become an undifferentiated megalopolis, stretching from Sacramento to Fresno.

Therefore, it is unwise to expend precious political, psychic, and financial capital in lobbying state officials to undercut their own power by authorizing a new layer of regional government, or in suggesting to city officials that they surrender their identities by merging into their larger neighbors.[14] Rather, those concerned by the *status quo* might try something new, and, yes, less ambitious. We must be mindful of planning titan Daniel H. Burnham's famous admonition, "Make no little plans." However, the plan to correct regional problems remains unchanged. It is the implementing strategy that must be reconsidered.

This article examines California's most basic form of local government, the county. Its central premise is that California counties are not merely second-rate localities, but are suited to address regional planning problems. Counties are and have always been an essential part of California's constitutional makeup. While cities and special districts come and go, counties remain. Furthermore, although not as powerful politically as their counterparts in cities, county officials already exist. That means that counties are relatively unthreatening to the State and other localities. Moreover, counties have their own sources of power. They have a tax base and their own identifiable constituency.

The discussion below has a simple format. First, I trace the political realities of California counties as a form of local government (Section II). Next, I establish the legal parameters that constrain California county government (Section III), and, in the process, tackle counterintuitive rules of law, like the immunity of city-owned property in unincorporated areas from county land use controls. Finally, I attempt to synthesize lessons from California politics and law to suggest a coherent strategy for reform, namely the creation of "county-wide affairs," or the adoption of the "urban county" plan (Section IV).

The discoveries in this article are not shocking. California counties are, in fact, poor relations to their municipal brethren. They are not currently vested with adequate power to perform regional plan-

14. These aspects of the regionalization movement are discussed throughout Brunetti, *supra* note 1, at 1103, and Frank P. Sherwood, *Some Major Problems of Metropolitan Areas, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1.

ning. However, both these shortcomings are easily cured through statutory reform, more easily I would argue, than the creation of new regional governments has proved.

II. A Brief History of California County Government

No regional planning strategy can succeed without reference to political realities. As one of California's best-known planners, William Fulton, has put it, "[P]lanning is inseparable from politics."[15] This section, provides a typology of local governments in California, explaining the evolution of county and other local government forms under the state's two constitutional regimes. Additionally, it briefly recounts the counties' relative decline in importance since World War II.

A. Typology of California Local Government

The California Constitution describes how counties, cities, and consolidated cities-and-counties come into being, and distributes to them certain powers. While special districts are the most common form of local government, the State Constitution almost fails to mention them. History shows that within the local government family, counties are the poorest of the four relations.

i. Counties

At present, the California Constitution requires that the State be subdivided into counties, and that the Legislature provide for "county powers."[16] California's 58 counties are local, political arms of the State.[17] As such, every county must perform functions assigned to it by the State.[18] However, the State Constitution also guarantees that a county may make and enforce within its boundaries all ordinances and

15. *See* WILLIAM FULTON, GUIDE TO CALIFORNIA PLANNING 8 (1991).

16. *See* CAL. CONST. art. XI, § 1; Cleland v. Sup. Ct. of Mendocino County, 52 Cal. App. 2d 530, 535 (1942) (citing Welsh v. Bramlet, 98 Cal. 219, 224 (1893) (Legislature must provide for counties)), *review denied*, Aug. 3, 1942; 16 Cal. Att'y Gen. Op. 79, 81 (1950) (same); *see also* CAL. CONST. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise.").

17. *See* County of Marin v. Sup. Ct. of Marin County, 53 Cal. 2d 633, 638 (1960); Los Angeles County v. Orange County, 97 Cal. 329, 331 (1893).

18. *See* Kahn v. Sutro, 114 Cal. 316, 319 (1896), *overruled in part on other grounds by* Rand v. Collins, 214 Cal. 168, 175 (1931).

regulations not in conflict with general laws.[19] Finally, the Legislature grants certain, specific authority to counties by statute.[20]

The county concept predates California statehood.[21] Under an 1837 law, Mexican California was divided into three prefectures: Baja California, and two others in Alta California that split roughly at San Luis Obispo.[22] In 1845, the Mexican governor subdivided the prefectures of Alta California into *partidos* centered around the communities of San Diego, Los Angeles, Santa Barbara, Monterey and Yerba Buena (San Francisco).[23] In 1849, delegates to the California Constitutional Convention, which also predated statehood, represented ten "districts" that roughly correspond to present-day counties.[24]

When the State Legislature first met in 1850, one of its earliest acts was to divide the state into 27 counties,[25] and to provide for the

19. *See* CAL. CONST. art. IV, § 7; Candid Entertainers, Inc. v. Grossmont Union High Sch. Dist., 39 Cal. 3d 878, 885 (1985); Hall v. City of Taft, 47 Cal. 2d 177, 184 (1956).

20. *See* CAL. GOV'T CODE § 23003 (West 1988) ("A county . . . has the powers specified in this title and such others necessarily implied from those expressed."); County of Modoc v. Spencer, 103 Cal. 498, 501 (1894) (county powers are purely statutory). *But see* CAL. CONST. art. XI, § 7 (county may make and enforce within its boundaries all ordinances and regulations not in conflict with general laws).

21. *See* People v. Lynch, 51 Cal. 15, 31 (1871).

22. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 18; J. ROSS BROWNE, THE CONSTITUTIONAL CONVENTION OF 1849, Appendix, at xxix-xxxi (San Francisco, James T. White & Co. 1878) (translated text of 1837 Mexican law). Unlike the Mexican districts, California's modern counties typically have lacked chief executives. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 25.

23. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 19.

24. *See id.*; OWEN C. COY, CALIFORNIA COUNTY BOUNDARIES 1 (rev. ed. 1979). The ten districts were: *San Diego*, *Los Angeles*, *Santa Barbara*, *San Luis Obispo*, *Monterey*, *San José*, *Sonoma*, *San Francisco*, *San Joaquin*, and *Sacramento*. *See* BROWNE, *supra* note 22. These same districts were used to apportion the two houses of the new State Legislature until the Legislature could pass laws creating counties. *See* CAL. CONST. OF 1849, Sched., § 14 (repealed 1879).

25. *See* "AN ACT subdividing the State into Counties and establishing the Seats of Justice therein," Cal. Stats. 1850, ch. 15, at 58-63 (Feb. 18, 1850); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 19. The original twenty-seven were: *San Diego*, *see* Cal. Stats. 1850 at 58; *Los Angeles*, *see id.*, at 59; *Santa Barbara*, *see id.*, at 155-56; *San Francisco*, *see id.*, at 59-60, 156; *Santa Clara*, *see id.*, at 60, 156; *Contra Costa*, *see id.*, at 60, 156; *Marin*, *see id.*, at 60; *Sonoma*, *see id.*, *Solano*, *see id.*, at 61; *Yola*, *see id.* (became *Yolo*, *see id.*, at 162); *Napa*, *see id.*, at 61; *Mendocino*, *see id.* (attached to Sonoma for judicial purposes until 1859, see id.); *Sacramento*, *see id.*; *El Dorado*, *see id.*, at 61-62; *Sutter*, *see id.*, at 62; *Yuba*, *see id.*, *Butte*, *see id.*; *Colusi*, *see id.* (Spelled *Colusa* from 1859 onward, see COY, *supra* note 24, at 4 n.5); *Shasta*, see Cal. Stats. 1850, at 62; *Trinity*, *see id.*; *Calaveras*, *see id.*, at 63; *San Joaquin*, *see id.*; *Tuolumne*, *see id.*; and *Mariposa*, *see id.* The Legislature acted on the basis of reports prepared by a committee chaired by General Mariano Guadalupe Vallejo, who also did most of the work. See COY, *supra* note 24, at 1-2, citing Cal. Sen. J., 1st. Sess. (1849), at 72, app. F at 420-21. Contrary to the Vallejo committee's advice, the Legislature made many mining districts into separate counties. *See id.*, at 4.

first county elections.[26] Between 1850 and the adoption of a new State Constitution in 1879, 26 more counties were carved out of the original set, one of which later dissolved.[27] Only six more counties have been added under the current Constitution, and none since 1907.[28]

ii. Cities

In 1850, after creating counties, the California Legislature acted to allow the incorporation of cities.[29] Today's State Constitution commands the Legislature to prescribe a uniform procedure for city formation and provide for city powers.[30] However, the State Constitution does not mandate the creation of cities, as it does of counties.[31] Instead, county residents must themselves petition for in-

26. *See* "AN ACT to provide for holding the First County Election," Cal. Stats. 1850, ch. 24, at 81-83 (Mar. 2, 1850).

27. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 19-21. The twenty-six newcomers were: *Klamath* (from Trinity, 1851), *see* Cal. Stats. 1851, at 180, (dissolved into Humboldt and Siskiyou, 1874), *see* Cal. Stats. 1873-74, at 755; *Nevada* (from Yuba, 1851), *see* Cal. Stats. 1851, at 177; *Placer* (from Yuba and Sutter, 1851), *see* Cal. Stats. 1851, at 176; *Siskiyou* (from Shasta and Klamath, 1852), *see* Cal. Stats. 1852, at 233; *Sierra* (from Yuba, 1852), *see* Cal. Stats. 1852, at 230; *Tulare* (from Mariposa, 1852), *see* Cal. Stats. 1852, at 240; *Alameda* (from Contra Costa, 1853), *see* Cal. Stats. 1853, at 56; *San Bernardino* (from Los Angeles, 1853), *see* Cal. Stats. 1853, at 119; *Humboldt* (from Trinity, 1853), *see* Cal. Stats. 1853, at 161; *Plumas* (from Butte, 1854), Cal. Stats. 1854, at 129; *Amador* (from Calaveras, 1854), *see* Cal. Stats. 1854, at 157; *Stanislaus* (from Tuolumne, 1854), *see* Cal. Stats. 1854, at 40; *Merced* (from Mariposa, 1855), Cal. Stats. 1855, at 125; *Buena Vista* (from Tulare, 1855, organized as *Kern*, 1865-66), *see* Cal. Stats. 1865-66, at 796; *San Mateo* (from San Francisco, 1856), *see* Cal. Stats. 1856, at 176; *Fresno* (from Mariposa, 1856), *see* Cal. Stats. 1856, at 183; *Tehama* (from Shasta, Colusi and Butte, 1856), *see* Cal. Stats. 1856, at 222; *Del Norte* (from Klamath, 1857), *see* Cal. Stats. 1857, at 35; *Mono* (from Calaveras and Fresno, 1861), *see* Cal. Stats. 1861, at 235; *Lake* (from Napa, 1861), *see* Cal. Stats. 1861, at 560; *Alpine* (from El Dorado, Amador, Calaveras, Tuolumne and Mono, 1864), *see* Cal. Stats. 1863-64, at 178; *Lassen* (from Plumas and Shasta, 1864), *see* Cal. Stats. 1863-64, at 453; *Coso* (from Tulare and Mono, 1864, organized as *Inyo*, 1866), *see* Cal. Stats. 1865-66, at 355); *Ventura* (from Santa Barbara, 1872), *see* Cal. Stats. 1871-72, at 484; *San Benito* (from Monterey, 1874), *see* Cal. Stats. 1873-74, at 95; and *Modoc* (from Siskiyou, 1874), *see* Cal. Stats. 1873-74, at 124.

28. The final six counties were: *Orange* (from Los Angeles, 1889), *see* Cal. Stats. 1889, at 123; *Glenn* (from Colusa, 1891), *see* Cal. Stats. 1891, at 98; *Riverside* (from San Diego and San Bernardino, 1893), *see* Cal. Stats. 1893, at 159; *Kings* (from Tulare, 1893), *see* Cal. Stats. 1893, at 176; *Madera* (from Fresno, 1893), *see* Cal. Stats. 1893, at 188; and *Imperial* (from San Diego, 1907), *see* Cal. Stats. 1907, at 275.

29. *See* "AN ACT subdividing the State into Counties and establishing the Seats of Justice therein," Cal. Stats. 1850, ch. 15, at 58-63 (Feb. 18, 1850); "AN ACT to provide for holding the First County Election," Cal. Stats. 1850, ch. 24, at 81-83 (Mar. 2, 1850); "AN ACT to provide for the Incorporation of Cities," Cal. Stats. 1850, ch. 30, at 87-91 (Mar. 11, 1850).

30. *See* CAL. CONST. art. XI, § 2(a).

31. Nevertheless, California law has long recognized cities' valuable role in society. *See, e.g., Lynch*, 51 Cal. at 29 ("municipalities are invaluable to a great and free people").

corporation as a city.[32] California's over 450 cities are "municipal corporations," formed for the purposes of local government, and, unlike counties, they are not subdivisions of the State.[33] The Legislature has authorized cities to exercise powers that are often identical to those of counties.[34] The result is that counties are left to exercise their powers only in unincorporated portions of their territories.

Municipal governments also predated California statehood. However, Mexican California was predominantly rural, and dense settlements were few and small. The Mexican census of 1842 counted only 196 San Franciscans, and in June, 1847, a year after the American conquest—but before the Gold Rush—there were still only 459.[35]

As American courts soon learned, Mexican local government was also complicated. Continuing with San Francisco as an example, the American city there grew out of several earlier communities.[36] Foreigners, especially Yankee merchants, concentrated in a hamlet that grew up around a cove directly across from Yerba Buena Island.[37] The older Spanish-Mexican settlement comprised three separate polities. The Spanish had founded two of these in 1776: a military base, the *Presidio*, which lay on the southern side of the Golden Gate, to the east of *Punta de Lobos*, and a religious center, *Mission San Francisco de Asis,* commonly known as *Mission Dolores*, which was situated inland toward the bay.[38] The *Presidio* spawned a *pueblo,*[39] which

32. *See* County of San Mateo v. Coburn, 130 Cal. 631, 636 (1900); *Kahn*, 114 Cal. at 319; Williams v. McClellan, 119 Cal. App. 2d 138, 142-43 (1953), *review denied*, Sept. 4, 1953.

33. *See* City of Salinas v. Souza & McCue, 66 Cal. 2d 217, 230-31 (1967) (unanimous); accord Abbott v. City of Los Angeles, 50 Cal. 2d 438, 467 (1958); *Coburn*, 130 Cal. at 636-37; People *ex rel.* Graves v. McFadden, 81 Cal. 489, 498 (1889) (unanimous); *see also* Butler v. Compton Junior Coll. Dist., 77 Cal. App. 2d 719, 728 (1947) (counties are not municipal corporations like cities), *review denied*, Mar. 20, 1947; Otis v. City of Los Angeles, 52 Cal. App. 2d 605, 611-12 (1942) (same).

34. *See, e.g.*, CAL. GOV'T CODE §§ 65300 (legislative body of each county and city must adopt a general plan); 65850 (legislative body of any county or city may adopt zoning ordinances), 66411 (regulation of subdivisions is vested in legislative bodies of cities, counties and cities-and-counties) (West 1997).

35. *See* BERNARD MOSES, THE ESTABLISHMENT OF MUNICIPAL GOVERNMENT IN SAN FRANCISCO 17 (Baltimore, Johns Hopkins Univ. Press 1889). I do not mean to suggest that San Francisco was California's largest settlement at the time. Until the Gold Rush, Monterey, the former capital of *Alta California,* was probably larger.

36. *See generally* Hart v. Burnett, 15 Cal. 530 (1860), *overruled on other grounds* by Risdon Iron & Loco. Works v. Citizens' Traction Co. of San Diego, 122 Cal. 94, 97 (1898).

37. The hamlet was also called Yerba Buena. The cove was later filled creating the modern city's Financial District.

38. *See* MOSES, *supra* note 35, at 5-6.

39. *See id., at* 6-7. Literally, *pueblo* means "people," but here it has the sense of the English word "town." *See* Trenough v. San Francisco, 100 U.S. 251, 252 (1880).

the Mexican Government granted a separate civil government in 1834.[40]

iii. Chartered Counties, Chartered Cities, and Chartered Cities-and-Counties

A few counties and many cities in California operate under a "charter."[41] The provisions of a charter become the law of the state and have the force and effect of legislative enactment.[42] In other words, the charter is something more than a local ordinance and less than the State Constitution itself.[43] However, as discussed below, the degree of autonomy gained by adopting a charter depends on whether the polity is a county or a city.[44]

Finally, a county and a city may consolidate into a chartered "city and county," which is essentially the same as a chartered city.[45] San

40. *See* Palmer v. United States, 65 U.S. 125, 127 (1861); MOSES, *supra* note 35, at 17-18. When *Mission Dolores* was secularized, the *Pueblo* succeeded to its property. *See* De Haro v. United States, 72 U.S. 599, 623 (1866). As for the *Presidio*, it passed from the Mexican Army directly to the U.S. Army in 1846, *see* United States v. Bateman, 34 F. 86, 87 (1888), and then to the National Park Service exactly 150 years later. Thus, although the *Presidio* is San Francisco's oldest European settlement, the city has never controlled it. *C.f. Bateman*, *supra*, at 90 (holding that *Presidio* not within exclusive jurisdiction of United States because U.S. controls it merely as a proprietor).

41. California is one of only a few states that allows its counties to become chartered. *See* Victor S. De Santis & Tari Renner, *Governing the County: Authority, Structure, and Elections*, *in* COUNTY GOVERNMENTS IN AN ERA OF CHANGE xii (David R. Berman ed., 1993). Even when permitted to charter, counties rarely do so. In 1988, only 117 out of 1,307 eligible counties nationwide had done so. *See id.*, *citing* TANIS J. SALANT, COUNTY HOME RULE: PERSPECTIVES FOR DECISION-MAKING IN ARIZONA (1988).

42. *See* Adams v. Wolff, 84 Cal. App. 2d 435, 440 (1948), *review denied*, May 17, 1948; *see also* Stern v. Council of City of Berkeley, 25 Cal. App. 685, 688 (1914) (adoption of charter by the State gives charter effect of state law); C. J. Kubach Co. v. McGuire, 199 Cal. 215, 217 (1926) (charter is not only organic law of city, but also law of state within constitutional limitations); Platt v. City and County of San Francisco, 158 Cal. 74, 84-85 (1910) (municipal charter is municipality's constitution enumerating and giving to it all the powers it possesses).

43. Originally, the State Legislature had to approve such charters. *See* CAL. CONST. art. XI, §§ 71/2 (county charters) (repealed June 2, 1970), 8 (city charters, and city and county charters) (repealed June 2, 1970); *see also* Brooks v. Fischer, 79 Cal. 173, 175-77 (1889) (Governor's signature not required). However, it did so without fail. *See* ARVO VAN ALSTYNE, BACKGROUND STUDY RELATING TO ARTICLE XI: LOCAL GOV'T 230-32 (1967) (describing legislative approval as an empty sham), *citing* Harrison v. Roberts, 145 Cal. 173, 178 (1904) ("practically only a formal matter"). Today, charters become effective when filed with the Secretary of State. *See* CAL. CONST. art. XI, § 3(a).

44. By adopting a charter, a county does not become a municipal corporation. *See McClellan*, 119 Cal. App. 2d at 142.

45. *See* CAL. CONST. art. XI, § 6(b); *Kahn*, 114 Cal. at 319, 322 ("Geographically, [San Francisco] is one of the legal subdivisions of the state .... Politically, it is regarded in [the State Constitution] as a municipal corporation."); *see also* Martin v. Bd. of Election

Francisco became the first consolidated city and county in 1856.[46] However, except for a brief experiment by Sacramento between 1858 and 1863,[47] no other California locality has followed suit.

iv. Special Districts

The last type of local government in California is the special district, which the State Constitution appears not to have recognized formally before the adoption of Proposition 13 in 1978.[48]

Special districts can perform "proprietary," as well as "governmental" functions.[49] In other words, the State often establishes special districts to provide services to the public, like fire protection, or water and sewerage, which are then financed by public bonds, taxes, and/or user fees.[50] Certain types of special districts, like drainage and sewer districts, are governed directly by county boards of supervisors.[51] Others are independent.

Although some had existed earlier in California, special districts did not catch on until the Legislature passed the Wright Act of 1887 to establish a system of irrigation districts.[52] The next year, the California Supreme Court rejected a claim that such districts were private

Comm'ers, 126 Cal. 404, 412 (1899) (provisions of constitution applying to counties do not apply to City and County of San Francisco). *But see* Keyes v. San Francisco, 177 Cal. 313, 323-24 (1918) (consolidated city and county partakes of the nature and has the powers and exercises the functions of both municipal corporation and subdivision of the State).

46. The Legislature passed a special act in 1856 to split off the City of San Francisco from present-day San Mateo County, and create the consolidated "City and County of San Francisco." *See* John C. Peppin, *Municipal Home Rule in California: III*, 32 CAL. L. REV. 341, 342 (1944) ("PEPPIN III"), *citing* Consolidation Act (a.k.a. "Hawes Act"), Cal. Stats. 1856, at 145.

47. *See id.*, *citing* Cal. Stats. 1858, at 67 and Cal. Stats. 1863, at 413-441.

48. Even since then, the only references to special districts in the Constitution are in connection with the tax limitation provisions. *See* CAL. CONST. art. XIIIA, § 4; art. XIIIB, § 8.

49. This archaic distinction is based upon the idea that government's activities can be separated into those performed for the general welfare of the public, such as activities under the police power ("governmental"), and those performed for the peculiar benefit and advantage of particular citizens or groups and therefore more resembling the activities of private persons ("proprietary"). *See generally* Guidi v. State of California, 41 Cal. 2d 623 (1953), *and cases there cited.* In practice, this distinction has been of no predictive use, and can only be made on a case-by-case basis. *See, e.g.*, Barrett v. City of San Jose, 161 Cal. App. 2d 41, 42 (1958). Litigating this issue ensured employment to generations of California lawyers, until judicial abrogation of governmental tort immunity made it largely irrelevant. *See* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 213 (1961).

50. *See generally* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1.

51. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 37, *citing* Cal. Stats. 1923, at 196 ff (drainage districts) *and* Cal. Stats. 1927, at 1088 (sewer districts); Dairy Belle Farms v. Brock, 97 Cal. App. 2d 146 (1950).

52. Act of Mar. 7, 1887, Cal. Stats. 1887, at 29.

corporations unconstitutionally allowed to levy taxes.[53] The court reasoned that irrigation districts were "*quasi* public corporations" because they were organized not for private gain but to address one of California's great public concerns.[54] Later, the court held that a special district's "*quasi*" status comes from exercising fewer powers than cities do.[55]

B. California's Constitutional Regimes

When the Americans assumed control of *Alta California* in 1846, they had varying preconceptions about local government from their years back East. In New England, counties were essentially unimportant, serving judicial functions, if any, while towns and cities dominated. In direct contrast, counties were all important in the Southern states.[56] Meanwhile, in the Middle Atlantic States, both counties and cities served as seats of local government. The largest number of American-born delegates to the Constitutional Convention of 1849 had arrived in California from this last region.[57] Therefore, it was not purely coincidence that the State Constitution established a system of local government in a middle ground between the New England and Southern models.

However, the Americans did not simply transplant in California their legal forms from back East.[58] Mexican California had had its own forms of local government,[59] including town councils, called *ayuntamientos*, and municipal offices, like the *alcalde*, who acted in

53. *See* Irrigation District v. Williams, 76 Cal. 360 (1888).

54. *See id.* at 369-70. The court used this same reasoning in Marin Mun. Water Dist. v. Chenu, 188 Cal. 734, 737-38 (1922) (unanimous) (refusing to construe the word "business" broadly to include public corporations of the State).

55. *See In re* Orosi Pub. Util. Dist., 196 Cal. 43, 56, 59 (1925) (unanimous) (public utility district is "*quasi*-municipal corporation"); In re *Madera Irr. Dist.*, 92 Cal. 296, 321-23 (1891); *see* also People v. Van Nuys Light. Dist., 173 Cal. 792, 798 (1916) (district's public purpose makes it "public corporation"); Low v. Mayor and Common Council of Marysville, 5 Cal. 214, 216 (1855) (distinguishing between "public" and "municipal").

56. *See generally* Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government: II*, 16 COLUM. L. REV. 299, 303-10 (1916).

57. *See* PETER THOMAS COMMY, THE CONSTITUTIONAL BEGINNINGS OF CALIFORNIA 20 (1959).

58. It was not for lack of trying. Three years after the American occupation of California had begun, the Military Governor, General Bennett Riley, voided San Franciscans' radical restructuring of their city government, and ordered them to revert to Mexican pueblo law. *See* MOSES, *supra* note 35, at 44-46.

59. *See* Fowler v. Smith, 2 Cal. 568, 568 (1852) (California governed under Roman (Civil) Law as modified by Spanish and Mexican legislation).

both executive and legislative capacities.[60] These forms endured during the American occupation,[61] through the Gold Rush of 1848,[62] and even past adoption of the state's first constitution in 1849 and its entrance into the Union the next year.[63]

Under California's first constitution, adopted in 1849 and approved by Congress in 1850, the State Legislature had complete power over all forms of local government. Unhappy with the results from this system, Californians adopted a new Constitution in 1879. This second iteration both prevented the State Legislature from doing as much and empowered local government to do more.[64] Major consti-

60. An *ayuntamiento* was the chief political body in large settlements, while an *alcalde* served as an administrator and judge with broad discretion. *See* MOSES, *supra* note 35, at 15-16, 18, 21, 25-29; *see also* BROWNE, *supra* note 22, at Appendix, at xxxiii (translated text of Mexican Law of March 20 1837). Once the Americans had taken control of San Francisco, they tinkered with both offices to suit the city's current needs. *See* MOSES, *supra* note 35, at 31-34.

61. *See* COMMY, *supra* note 57, at 6, *quoting* COMM. JOHN D. SLOAT, PROCLAMATION TO THE PEOPLE OF CALIFORNIA (issued at Monterey, July 7, 1847):

> With full confidence in the integrity and honor of the inhabitants of the country I invite the Judges, Alcaldes and other civil officers, to retain their offices . . . until the government of the territory can be more definitely arranged;

and at 8, BRIG. GEN. STEPHEN W. KEARNEY, PROCLAMATION TO THE PEOPLE OF CALIFORNIA (issued at Monterey, Mar. 1, 1847):

> [T]he laws now in existence, and not in conflict with the Constitution of the United States, will be continued until changed by competent authority; and those persons who hold office will continue in the same for the present, provided they swear to support that Constitution and to faithfully perform their duty.

62. *See Treaty of Peace, Friendship, Limits and Settlement between Mexico and the United States, signed at Guadalupe Hidalgo, February 2, 1848*, 102 THE CONSOLIDATED TREATY SERIES 29, 40-41, 42, (Clive Parry ed., 1981), art. VIII ("Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, . . . retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please . . . ."), art. IX ("Mexicans . . . shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of [sic] by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and property . . . .").

63. *See* CAL. CONST. OF 1849, Schedule, § 1 ("All rights, prosecutions, claims, and contracts, *as well of individuals as of bodies corporate*, and all laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted.") (emphasis added) (repealed 1879); Payne & Dewey v. Treadwell, 16 Cal. 220, 228 (1860), *quoting Burnett*, 15 Cal. at 559; MOSES, *supra* note 35, at 46-47. The new State Legislature abolished *alcaldes* and replaced them with justices of the peace in 1850. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 26, *citing* Cal. Stats. 1850, at 80. During the same legislative session, the Legislature adopted the Common Law. *See Fowler*, 2 Cal. at 568-69.

64. *See infra*, notes 89-128.

tutional amendments gave the option of charter-based Home Rule first to cities (1896), and then to counties (1911).[65]

Though much amended and revised, the 1879 Constitution remains California's organic law. However, during the present constitutional regime, one might say that California politics has not corresponded with the blueprint. Home Rule has been both less and more than its founders expected: less, because courts have not permitted counties and other "local agencies of the State" to operate as autonomously as cities do; more, because city autonomy has stymied regional solutions to regional problems.

i. The California Constitution of 1849

Bitterly divided over the extension of slavery into United States territories, Congress still had not authorized a territorial government for California even two years into the American occupation. Meanwhile, immigrants flooded into the state in search of fortune. Responding to popular impatience, California's Military Governor authorized a constitutional convention, which met at Monterey during September 1849. Soon after, California voters ratified the document produced there, which was already in effect when California entered the Union in September, 1850.

Like all State Constitutions, California's did not enumerate the powers of the representative body of the sovereign people, the Legislature, but rather placed limitations upon their exercise.[66] Some of these limits related to local government, expressly including counties and cities. The Legislature, however, was unquestionably superior in power to both of these.

As to counties, the constitution required the Legislature to establish a system of county governments by uniform (*i.e.* general) laws.[67] Counties were not municipal corporations, but subdivisions of the State.[68] The State Constitution endowed the Legislature with the fur-

65. *See infra*, notes 129-146.

66. *See Ex parte* McCarthy, 29 Cal. 395, 403 (1866); *c.f.* Gibbons v. Ogden, 22 U.S. 1, 204-05 (1824) ("In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous state governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise.").

67. *See* CAL. CONST. OF 1849 art. XI, § 4 (repealed). For a discussion by a California court of "general" and "uniform" laws, *see* Coulter v. Pool, 187 Cal. 181, 192-93 (1921) *and* John C. Peppin, *Municipal Home Rule in California: II*, 30 CAL. L. REV. 272, 282-83 (1942) ("PEPPIN II").

68. *See* Sharp v. Contra Costa County, 34 Cal. 284, 290 (1867), *citing* Hunsacker v. Borden, 5 Cal. 288, 290 (1855) (creditor of county has no remedy by virtue of county's

ther power to provide for the election of county boards of supervisors, and define their powers.[69] The Legislature could also move county seats at will.[70]

By statute, county boards of supervisors were authorized, among other things, to purchase and manage property; lay out and oversee public rights-of-way; care for the indigent sick; subdivide their territories into townships; set election precincts, build and maintain necessary public buildings, such as courthouses and jails; litigate cases as a party; and "do and perform all such other acts and things as may be strictly necessary" to discharge such powers conferred.[71]

The 1849 Constitution referred also to "towns,"[72] by which the delegates to the constitutional convention appear to have meant what are more properly called "townships."[73] Legally, a town or township was not like a city at all; rather, it was an unincorporated subdivision of the county.[74] The Legislature provided for town formation under an 1850 act.[75] However, it seems the few towns that were formed under this act served merely as judicial districts at the sub-county level.[76]

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derivative sovereignty); *see* also People v. Bd. of Supervisors of Sacramento County, 45 Cal. 692, 695 (1873) (county is not a municipal corporation).

69. *See* CAL. CONST. OF 1849 art. XI, § 5 (repealed 1879). Until the Legislature got around to creating county boards of supervisors in 1852, judges of the county courts of sessions ran the counties, as was the style in many southern states. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 17, 32, *citing* Cal. Stats 1850, at 176, 210-11. Under the 1849 Constitution, there was no separation of powers at the local level. County boards of supervisors were simultaneously legislative, judicial and administrative bodies. *See* Waugh v. Chauncey, 13 Cal. 11, 12 (1859); *see also* Murray v. Bd. of Supervisors of Mariposa County, 23 Cal. 492, 495 (1863) (district courts have power to grant writs of *certiorari* to review action of board of supervisors in denying ferry license).

70. *See* Upham v. Bd. of Supervisors of Sutter County, 8 Cal. 378, 382 (1857) (Legislature may confer decision on location of county seats to the people); *see also* Atherton v. Bd. Of Supervisors of San Mateo County, 48 Cal. 157, 160 (1874) (because court will not set policy, removal of county seat only reviewable for compliance with statutory procedures).

71. *See* "AN ACT to create a Board of Supervisors in the Counties of this State, and to define their duties and powers", Cal. Stats. 1855, ch. 157, § 9, at 53 (Mar. 20, 1855).

72. *See* CAL. CONST. OF 1849 art. XI, § 4 (repealed).

73. *See* Kenyon v. Johnson, 97 Cal. App. 552, 554, 555 (1929).

74. *See id.* at 554-555.

75. *See* "AN ACT to provide for the incorporation of Towns," Cal. Stats. ch. 48, at 128-31 (Mar. 27, 1850).

76. *See Ex parte* Wall, 48 Cal. 279, 321 (1874), *overruled in part on other grounds by Ex parte* Beck, 162 Cal. 701, 705 (1912). Yet another provision of the 1849 Constitution referred to an "incorporated village." *See* CAL. CONST. OF 1849 art. XI, § 9 (repealed 1879). It seems, however, that the Legislature ignored this form of local government altogether.

In contrast to counties and towns, cities were municipal corporations,[77] and the State could form them individually by "special" act.[78] In addition, the constitution required the Legislature to provide for city organization and to restrict cities' powers of taxation, borrowing, contracting debts, and loaning their credit "so as to prevent abuses."[79] Even before Judge John Dillon enunciated it, the California Supreme Court already observed "Dillon's Rule," that cities were purely creatures of the State.[80] Thus, in 1867, the California Supreme Court held that cities were invested with such power and capacity only as conferred by statute expressly or by necessary implication.[81]

During this period, many California cities had charters issued to them by the State.[82] Typically, these charters granted several powers: to make ordinances and set penalties, to regulate businesses, to prevent and remove nuisances,[83] to regulate construction, to build and keep public buildings, to operate schools, to manage city elections, to borrow money, and to levy some taxes.[84] Still, when it wished, the Legislature could cut out the middlemen, and legislate on behalf of specific city councils.[85]

77. *See Bd. of Supervisors of Sacramento County*, 45 Cal. at 693 (county is not a municipal corporation; City and County of San Francisco v. Canavan, 42 Cal. 541, 557-58 (1872) (municipal corporations may be created, altered, or abolished at the will of the Legislature).

78. *See* CAL. CONST. OF 1849 art. IV, § 31 ("Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes.") (repealed 1879). Except for this rule, it does not appear that the State Constitution distinguished between municipal corporations and other types of corporations:

> The term corporations as used in this article shall be construed to include all associations and joint-stock companies, having any of the powers or privileges of corporations not possessed by individuals or partnerships. And all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.

See id. art. IV, § 33.

79. *Id.*, art IV, § 37; John C. Peppin, *Municipal Home Rule in California: I*, 30 Cal. L. Rev. 1, 7 (1970) ("PEPPIN I").

80. *Compare* People *ex rel.* Att'y Gen. v. Hill, 7 Cal. 97, 103 (1857) and City of Clinton v. Cedar Rapids and Missouri River R. Co., 24 Iowa 455, 475 (1868) (Dillon, J.), *overruled by state constitutional amendment as noted in* City of Clinton v. Sheridan, 503 N.W.2d 690, 691 (Iowa 1995); John C. Dillon, 1 MUN. CORPS., § 98 (5th ed. 1911).

81. *See* Herzo v. San Francisco, 33 Cal. 134, 143 (1867); *see also* Johnson v. Bradley, 4 Cal. 4th 389, 394-95 (1992) (summarizing constitutional history of California cities).

82. *See* PEPPIN I, *supra* note 79, at 7-11.

83. By statute, every incorporated city in California could penalize and regulate business and abate nuisances. *See* "AN ACT to provide for the incorporation of cities," Cal. Stats. 1850, ch. 30, at 87-88 (March 11, 1850).

84. *See* JOHN C. BOLLENS & STANLEY SCOTT, LOCAL GOVERNMENT IN CALIFORNIA, 12 (1951).

85. *See* PEPPIN I, *supra* note 79 at 16-19.

In summary, under the Constitution of 1849, the State Legislature had complete power over both counties and cities.[86] The Legislature was not shy, and often meddled in local affairs.[87] It flouted the Constitution by regulating counties through special laws,[88] and took full advantage of its legitimate power to regulate cities' behavior. Examples from the period include: directing payments of a claim to a named individual, ordering the issuance of bonds in specified amounts, requiring tax levies to support favored enterprises, establishing special commissions to handle local debts, and authorizing the Governor to appoint a board to control local public works.[89]

ii. The California Constitution of 1879

A political movement for land and tax reform, as well as open hostility toward Chinese labor, led California to a second Constitutional Convention in 1878.[90] The resulting document, adopted in 1879, did not institute land reform,[91] but it did introduce a modicum of autonomy for California localities.[92]

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86. *See supra*, notes 67-86.

87. *See* Daniel U. Smith, *San Francisco Bay: Regional Regulation for its Protection and Development*, 55 CAL. L. REV. 728, 760 (1967); BOLLENS & SCOTT, *supra* note 84, at 13; PEPPIN I, *supra* note 79, at 10-11.

88. The California Supreme Court ruled that the relevant provision was merely "directory." *See* W. F. HENNING, LAW RELATING TO COUNTY GOVERNMENT IN CALIFORNIA, 2 (2nd ed. 1901), *citing* People *ex rel.* Bd. of Supervisors of Solano County v. Lake County, 33 Cal. 467, 494 (1867); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 26.

89. *See* Smith, *San Francisco Bay: Regional Regulation for its Protection and Development*, *supra* note 87, at 760, *citing, e.g.*, Cal. Stats. 1859, ch. 8, at 6; Cal. Stats. 1869, ch. 78, at 78 (claim to named person); Cal. Stats. 1862, ch. 78, at 957 (directing San Francisco supervisors to issue school bonds in a specified amount); Cal. Stats. 1860, ch. 307, at 286 (ordering consolidated City and County of Sacramento to levy taxes to support State Agricultural Society); Cal. Stats. 1851, ch. 88, at 387 (designating for the City of San Francisco "Commissioners of the Funded Debt"); Cal. Stats. 1875, ch. 570, at 856 (authorizing governor to appoint a board to control public works in Los Angeles); *see also* PEPPIN I, *supra* note 79, 30 CAL. L. REV. at 11-14 nn.26-35 (citing many more examples).

90. *See* CARL BRENT SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1878-1879 (reprint ed., Da Capo Press, 1969).

Among other ideas, would-be reformers proposed limiting land ownership to 1,000 or 640 acres and removing a ceiling on real property taxes, but the convention did not adopt them. *See* GATES, *supra* note 6 at 224, 267, 322; DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA, 1878-1879 (Sacramento, State Printing Office, 1880), 96 (proposal by Abraham C. Freeman (Sacramento County) to limit land ownership to 1,000 acres, referred to Committee on Land and Homestead Exemption), 470 (proposal by Hamlet Davis (Nevada County) to allow Legislature to limit land monopolization).

91. *See* GATES, *supra* note 6, at 224-25.

92. One of the reformers' hopes was that the new constitution would require land held speculatively to be taxed at the same rate as improved land. *See id.*, at 322. However,

Generally, the Convention delegates resented the State Legislature's interference in their local affairs.[93] Not surprisingly, delegates from the growing metropolis of San Francisco were hottest about the issue.[94] They were not the only ones. As a delegate from rural Tulare County explained, "the people" had called for a Convention in part because they believed they could govern themselves better than the Legislature could.[95]

According to California Constitutional scholar John C. Peppin, the delegates wanted to ensure that each locality possessed the power to incur debts along with the power to tax.[96] That way, the delegates could eliminate the Legislature's ability to impose "unfunded mandates"—to use current terminology.[97] Moreover, the delegates wanted to make it harder for the Legislature to change local jurisdictions by moving county seats or creating new counties.[98]

The new constitution's section on local government, Article XI, purported to end these perceived abuses by the Legislature of the

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assessment and levying were left up to the discretion of the State Board of Equalization and the counties' boards of supervisors. *See id.*

93. For an account of public dissatisfaction with the State Legislature's practice of running roughshod over local governments, see PEPPIN I, *supra* note 79, at 34-37.

94. *See, e.g.*, GATES, *supra* note 6, at 139 (proposed amendment by Jacob R. Freud (City and County of San Francisco) on special laws and city incorporation), 228 (proposed amendment by Patrick T. Dowling (City and County of San Francisco) to empower and authorize his community "to legislate exclusively for itself and attend to its own local affairs, independent of the Legislature," referred to Committee on City, County, and Township Organizations).

95. *See* GATES, *supra* note 6, at 1063 (remarks by Joseph C. Brown (Tulare County) during debate on provision allowing cities to adopt freeholders' charters).

96. *See* John C. Peppin, *Municipal Home Rule in California: IV*, 34 CAL. L. REV. 644, 680 (1946) ("PEPPIN IV").

97. *See id.* at 659-60, *citing with approval* Wulff-Hansen & Co. v. Silvers, 21 Cal. 2d 253, 268-69 (1942) (Carter, J., dissenting) (saddling debt upon city is like imposing a tax) *and* Shealor v. City of Lodi, 23 Cal. 2d 647, 653 (1944) (same); *see also* McCabe v. Carpenter, 102 Cal. 469, 471 (1894) (If Legislature cannot impose tax upon property or inhabitants of school district, it would seem to follow that it cannot prescribe procedure through which such tax would inevitably be levied without leaving some discretion to local authorities.).

To Peppin, the power to incur debts probably implied proprietary powers, such as the authority to operate public works. *See* Von Schmidt v. Widber, 105 Cal. 151 (1894) (city's real estate purchase not within the police power). However, at least at one time, the California Supreme Court distinguished between governments' regulatory power and their power to tax. *See* Ainsworth v. Bryant, 34 Cal. 2d 465, 470 (1959). Sometimes, making such a distinction seems to work unfairly. *C.f.* Trebilcox v. City of Sacramento, 91 Cal. App. 257, 263 (1928) (holding that revocation of license is not necessarily a regulatory act, even if licensee rendered unable to do business).

98. *See, e.g.*, GATES, *supra* note 6, at 156-57 (remarks of Josiah Boucher (Butte County) on minimum size and voter approval for all new counties). During the proceedings, the delegates swapped stories of the Legislature creating new counties on thin quorums so that lobbyists could secure county offices. *See id.* at 1042.

State's paramount power.[99] First, Section 11 of Article XI ("Section 11"), granted "police power"[100] to every county, town, township, city, and city and county in the state.[101]

The grant of such power to towns and townships is a curiosity.[102] As had been true under the Constitution of 1849, towns or townships were unincorporated subdivisions of counties, not municipal corporations, like cities.[103] In practice, the Legislature never authorized the organization of towns or townships for administrative purposes, but only judicial ones,[104] which proved unpopular.[105] In the 1940s, Professor Peppin concluded that the Town of Antioch, formed in 1872 under the Constitution of 1849 and incorporated as a city in 1890, was the last *bona fide* town the State has seen.[106]

99. *See Bradley*, 4 Cal. 4th at 395, *citing* People v. Hoge, 55 Cal. 612, 618 (1880).

100. "The police power is the inherent reserved power of the State to subject individual rights to reasonable regulations for the general welfare." Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 325 (1981). Modern courts give enormous deference to government in determining what regulations serve the general welfare. *See* Miller v. Bd. of Pub. Works, 195 Cal. 477, 484 (1925) (police power is elastic and evolves along with our society); *c.f.* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984) (court will not substitute its judgment for a legislature's judgment as to what constitutes a public use unless the use be palpably without reasonable foundation); City of Oakland v. Oakland Raiders, 32 Cal. 3d 60, 72 (1982) ("'A public use defies absolute definition, for it changes with varying conditions of society, new applications in the sciences, [and] changing conceptions of the scope and functions of government.'"); Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

101. CAL. CONST. art. XI, § 11 (repealed June 2, 1970). Section 11 applied to a consolidated city and county by virtue of former Article XI, § 7 (repealed June 2, 1970). *See* PEPPIN III, *supra* note 46, at 341, *citing Ex parte* Keeney, 84 Cal. 304, 305-06 (1890).

102. In debate, the Convention delegates had used the terms "town" and "township" interchangeably. *Compare* GATES, *supra* note 6, at 161-62 (proposal by James McM. Shafter (3rd Cong. Dist.) to create at least three "towns" within every county, and require every subsequent town to be at least 36 square miles in size) *with id.*, at 285 (proposal by Hiram Mills (Contra Costa County) to require three "townships" in each county, with 30 square-mile minimum size after the first three).

103. *See* CAL. CONST. art. XI, § 4 (repealed June 2, 1970) (requiring Legislature to provide through general law for counties to adopt township organization whenever a majority of county voters so determine); GATES, *supra* note 6, at 1046-49 (all speakers assuming township is mere subdivision of county).

104. *See* Cox v. Jerome, 31 Cal. App. 97, 98-99 (1916), *review denied*, Sept. 18, 1916; *Kahn*, 114 Cal. at 332, *citing* County Government Act, § 58, Cal. Stats. 1893, at 366 (directing county boards of supervisors to divide their respective counties into townships for purpose of electing justices of the peace and constables); *Kenyon*, 97 Cal. App. at 554 (California township officers limited to justices of the peace and constables); VAN ALSTYNE, *supra* note 43, at 80-81; CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 72.

105. *See* PEPPIN III, *supra* note 46, at 318.

106. *See* PEPPIN I, *supra* note 79, at 7-11.

Otherwise, the grant of such broad powers to local government has had major implications for intergovernmental relations in California. In several places, the new Constitution forbade the Legislature from passing special laws affecting either counties or cities.[107] It also stipulated that no new county could be created without a minimum number of inhabitants.[108] The delegates' final innovation was Section 7 of Article XI ("Section 7"), which allowed cities with more than 100,000 residents to adopt a freeholders' charter.[109] Only San Francisco had a population that large.

Sadly, the delegates did not say much about the police power, and made no attempt to define the term.[110] Section 11's plain text meant that where there was no conflict with the State's general laws, a locality's police power within its territory was as broad as the State Legisla-

107. *See, e.g.*, CAL. CONST. art. IV, § 25 (repealed June 2, 1970) (declaring that Legislature shall not pass local or special laws "regulating county and township business of the election of county and township officers," or "creating offices, or prescribing the powers and duties of officers in counties, cities, cities[-]and[-]counties, townships, election or school districts," or "affecting the fees or salary of any officer."); *id.* art. XI, § 4 (repealed June 2, 1970) ("The legislature shall establish a system of county governments which shall be uniform throughout the State . . . .").

This principle appears today in Article IV, § 16(b), but, in enforcing it, courts are very deferential to the Legislature. A law is general as long as it has a "substantial relation to the purpose to which the legislation was designed." *See* Sacramento Mun. Util. Dist. v. Spink, 145 Cal. App. 2d 568, 572 (1956).

108. *See* CAL. CONST. art. XI, § 3 (repealed June 2, 1970). The delegates probably thought this provision was important because they debated it at great length. *See* GATES, *supra* note 6, at 1042-46.

109. Cities themselves initiated a "freeholders' charter," subject to veto by the State Legislature. Formerly, cities obtained "special charters," which the Legislature drafted and could amend.

110. *But see* GATES, *supra* note 6, at 174 (remarks of Joseph R. Weller (Santa Clara County) proposing autonomous local legislative powers in areas of "county business" and "city taxation and expenditures), at 1491 (remarks of William P. Hughey (City and County of San Francisco) proposing that "local sanitary, moral, and police government" be left to county, city, or city-and-county).

The delegates' silence may have been due partly to then-recent California Supreme Court decisions that had protected localities to some degree. *See* BOLLENS & SCOTT, *supra* note 84, at 13; PEPPIN I, *supra* note 79, at 34. For example, in 1871, the court had held that the State Legislature could not validate illegal assessments made by a city. *See Lynch*, 51 Cal. at 23-24. And, in 1861, the court had held that the State could not take back lands it earlier had granted to the City and County of San Francisco. *See* Grogan v. City and County of San Francisco, 18 Cal. 590, 613 (1861).

ture's.[111] Yet, it was also clear textually that the Legislature could always render local legislation invalid by passing new general laws.[112]

In the years after the new Constitution's adoption, California courts clarified its meaning. The police power came to be as broad as it sounded.[113] That is, within their own territories, counties and cities possessed legislative powers equal to the Legislature's.[114] California courts held that the police power included the ability both to assess and levy certain taxes,[115] and to set the "rules of conduct to be observed by the citizens."[116] Once zoning came into vogue during the 1920s, the California Supreme Court held, even before *Village of Euclid v. Ambler Realty Co.*,[117] that the police power of counties and cities included the ability to regulate land uses.[118]

111. *See* CAL. CONST. art. XI, § 11 (repealed June 2, 1970) ("Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."). Professor Van Alstyne agrees that the delegates' intent in this was clear. *See* VAN ALSTYNE, *supra* note 43, at 298.

112. *See* CAL. CONST. art. XI, § 11 (repealed June 2, 1970).

113. *See Miller*, 195 Cal. at 484 (police power is elastic and evolves along with our society); *see, e.g.,* Allied Architects' Ass'n of Los Angeles v. Payne, 192 Cal. 431, 434 (1923) (promotion of patriotism a valid public purpose).

The police power is limited by the federal constitutional doctrine of Substantive Due Process. Substantive Due Process requires that regulations not only serve the general welfare but be "reasonable" as well. Regulations violate Substantive Due Process if they have no rational relationship to a legitimate governmental interest, or, stated another way, they are irrational or plainly arbitrary. *See* Lockary v. Kayfetz, 917 F.2d 1150, 1155 (9th Cir. 1990); Ewing v. City of Carmel-by-the-Sea, 234 Cal. App. 3d 1579, 1592 (1991); *see also* Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 607 (1976) (land use ordinance is valid if it "reasonably relates to the welfare of those *whom it significantly affects*") (emphasis added).

114. *See* Jardine v. City of Pasadena, 199 Cal. 64, 68 (1926); *In re* Isch, 174 Cal. 180, 181-82 (1917); Odd Fellows' Cemetery Ass'n v. City and County of San Francisco, 140 Cal. 226, 231 (1903). This was the delegates' intent. They voted down a proposed amendment that would have forbidden localities to exercise power which the Legislature had not provide for. *See* GATES, *supra* note 6, at 1052.

115. *See Ex parte* Mount, 66 Cal. 448, 450-51 (1885); *see also* County of Los Angeles v. Eikenberry, 131 Cal. 461, 466-67 (1901) (county license tax on businesses are within Section 11 power); Hughes v. Ewing, 93 Cal. 414, 418 (1892) (Legislature must enact general laws to give localities taxing power); *Ex parte* Pfirrman, 134 Cal. 143, 149 (1901) (Legislature has discretion in passing general laws to give localities taxing powers).

116. *Von Schmidt*, 105 Cal. at 161 (city's real estate purchase not within the police power).

117. 272 U.S. 365.

118. *See Miller*, 195 Cal. 477 (upholding residential zoning); Zahn v. Bd. of Pub. Works, 195 Cal. 497, 502-03 (1925) (following *Miller*); Fourcade v. City and County of San Francisco, 196 Cal. 655, 662 (1925) (following *Miller* and *Zahn*).

In contrast to Section 11, the delegates had a lot to say about special laws, which their new Constitution banned almost entirely.[119] One of the delegates' chief purposes in convening was to constrain the Legislature to making only general laws of statewide application.[120] The State could no longer create counties through special acts.[121] Section 12 of Article XI provided that to pay for local government purposes, the State could not impose taxes on any locality, "or upon their inhabitants or property thereof."[122] Section 13 of Article XI barred the Legislature from delegating to state commissions, or any other body, the power to: (1) preside over local money, property, or effects—governmental or proprietary; (2) levy taxes for local issues; or (3) perform "municipal" tasks.[123]

Once the new constitution was in place, the State Legislature adopted the Municipal Corporations Act in 1883,[124] which set out statutory charters for six different classes of cities, based on population.[125] Cities that availed themselves of these ready-made charters still exercised their inherent police power as stated in the constitution, and their ordinances were still subject to the Legislature's general laws.[126]

119. *See, e.g.*, CAL. CONST. art. IV, § 25 (repealed June 2, 1970) (declaring that Legislature shall not pass local or special laws "regulating county and township business of the election of county and township officers," or "creating offices, or prescribing the powers and duties of officers in counties, cities, cities[-]and[-]counties, townships, election or school districts," or "affecting the fees or salary of any officer.")

120. *See* PEPPIN IV, *supra* note 96, at 644 (delegates had little to say about Article XI, § 11, but debated at length ban on state's imposing taxes by special laws made in Article XI, § 12).

121. Although contrary to the delegates' intent, the Legislature remained free to effect boundary changes by special act. *See* Wheeler v. Herbert, 152 Cal. 224, 228-29, 232-33 (1907) (unanimous) (State may not create new county by special act but may alter county boundaries in that manner); *see also* VAN ALSTYNE, *supra* note 43, at 65, *citing* People *ex rel.* Graves, 81 Cal. at 498-99 (State cannot be required to create new counties by general law).

122. CAL. CONST. art. XI, § 12 (repealed June 2, 1970); *see* PEPPIN IV, *supra* note 96, at 644. Interestingly, Section 12 protected localities' property but not their *inhabitants'* property. *See id.* at 648-49. This was probably just a drafting error. *See id.* In 1974, the substance of Section 12 was reincarnated as part of Article XIII. *See* CAL. CONST. art. XIII, § 24 (adopted Nov. 5, 1974).

123. *See* PEPPIN IV, *supra* note 96, at 678-79.

124. Cal. Stats. 1883, at 93.

125. *See* Rondell B. Hanson, Comment, *Business Licensing: The City-State Conflict in California*, 49 CAL. L. REV. 330, 331 n.1 (1961); PEPPIN II, *supra* note 67, at 283-88, 295-312, 317. At the Constitutional Convention, delegate W. W. Moreland (Sonoma County) had suggested limiting the number of classes for cities to four. *See* GATES, *supra* note 6, at 222. This was not adopted.

126. *See* Hurst v. City of Burlingame, 207 Cal. 134, 138 (1929) (general law cities subject to Legislature's general laws), *overruled on other grounds by* Associated Home Builders, 18 Cal. 3d at 588, 596; City of San Mateo v. Railroad Comm'n, 9 Cal. 2d 1, 7 (1937)

In 1887, California voters amended Article XI to extend the self-chartering privilege of Section 7 to any city with a population over 10,000.[127] During the next two years, Los Angeles, Oakland, Stockton and San Diego adopted charters.[128] In 1890, California voters lowered the self-chartering threshold again, this time to include cities of greater than 3,500 people.[129]

A state constitutional amendment in 1896 finally empowered self-chartered cities to insulate themselves from state legislation in the area of "municipal affairs."[130] Then, as now, courts defined this term case by case.[131] The definition is complicated further by its possible overlap with the "police power," which is allocated under Article XI to all counties, cities, and consolidated cities-and-counties.[132]

Even after this last innovation, California courts remained loyal to Dillon's Rule by construing city charters strictly.[133] Thus, the California Supreme Court held in 1891 that the State Legislature could not authorize a Los Angeles treasurer to deposit funds into a private bank when the City of Los Angeles' charter did not specifically authorize it.[134] Cities responded by amending their charters to provide for every power conceivable.[135]

(chartered cities subject to Legislature's general laws when "municipal affairs" not at issue).

127. *See* VAN ALSTYNE, *supra* note 43, at 218. For the text of the amendment, *see* Cal. Stats. 1887, at 88.

128. *See id.*, *citing* HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE, 204 (1916).

129. The cities of Napa, Eureka, and Grass Valley enacted their charters under this amendment. *See id.*, *citing* MCBAIN, *supra* note 128, at 229.

130. *See Bradley*, 4 Cal. 4th at 395. For the text of the amendment, *see* Cal. Stats. 1895, at 450. For a discussion of "municipal affairs," *See supra* part II.A.ii.b.

131. *See infra* notes 289-292.

132. *See, e.g.,* McEwen, *supra* note 1, at 444 n.64, *citing* Sho Sato, *"Municipal Affairs" in California*, 60 CAL. L. REV. 1055, 1095 (1972).

133. *See* Nicholl v. Koster, 157 Cal. 416 (1910) (holding that because City and County of San Francisco's charter did not mention probation officers and their assistants then city could not regulate them); *see also* John Rapp and Son v. Kiel, 159 Cal. 702, 706-09 (1911) (reading city charter strictly to exclude all powers not expressed).

134. *See* Smith, *San Francisco Bay: Regional Regulation for its Protection and Development, supra* note 87, 55 CAL. L. REV. at 761, *citing* Yarrell v. City of Los Angeles, 87 Cal. 603 (1891), *abrogated by constitutional amendment as recognized* in Howard Jarvis Taxpayers' Ass'n v. Fresno Metro. Projects Auth., 48 Cal. App. 4th 1359, 1370 (1995), *as modified on denial of reh'g*, Jan. 10, 1996, *review denied*, Mar. 20, 1996.

135. *See, e.g.*, Charter of the City and County of San Francisco, *as codified in the* Consolidation Act of April 19, 1856, and amendments, *in* A. E. T. WORLEY, THE CONSOLIDATION ACT AND OTHER ACTS RELATING TO THE GOVERNMENT OF THE CITY AND COUNTY OF SAN FRANCISCO (San Francisco, Wm. M. Hinton & Co. 1887) (442 pages, not including summary table and index).

Nor, for its part, did the State Legislature honor the Constitutional Convention delegates' antipathy toward special laws. For example, it passed general laws that simply created a single class for each of the state's 58 counties, and the California judiciary acquiesced.[136] Also, in spite of Section 11's plain language, the courts held that localities could tax their residents only with specific authorization from the State Legislature,[137] although chartered cities could levy license and property taxes as a municipal affair.[138]

In 1911, California voters approved Section 71/2[139] of Article XI ("Section 71/2"), which added charter-based home rule for counties.[140] In 1914, the voters approved yet another amendment to Article XI,[141] this time to end the enumeration-of-powers problem.[142] This last amendment assured that a chartered city could make and enforce all laws and regulations with respect to its municipal affairs, except as limited by its charter.[143] City charters became much shorter.

However, the effect of adopting a charter differed depending on whether a county or a city was involved.[144] From the start, California courts have held that, while a chartered city gains autonomy over its municipal affairs and its ordinances in that area supersede contrary

136. *See* Longan v. County of Solano, 65 Cal. 122, 125 (1884) (Legislature's establishment of 48 classes for setting fees and salaries of county officers where 52 counties exist does not clearly violate the State Constitution); VAN ALSTYNE, *supra* note 43, at 69; PEPPIN II, *supra* note 67, at 293 n.67, *citing* Johnson v. Gunn, 148 Cal. 745 (1906) (approving 58 classes for 58 counties).

137. *See Pfirrman*, 134 Cal. at 149 (Legislature has discretion in passing general laws to give localities taxing powers).

138. *See Ex parte* Braun, 141 Cal. 204, 210 (1903). Proposition 13 and its progeny have since complicated matters. *See infra* part I.C.iv.

139. For the text of this amendment, *see* Cal. Stats. 1911, at 2168.

140. *See* Pulcifer v. County of Alameda, 29 Cal. 2d 258, 261 (1946) (unanimous); Reuter v. Bd. of Supervisors, 220 Cal. 314, 326-27 (1934); Brown v. Francisco, 123 Cal. App. 2d 413, 416 (1954); Lesem v. Getty, 23 Cal. App. 2d 57, 60-61 (1937); Younger v. Bd. of Supervisors of El Dorado County, 93 Cal. App. 3d 864, 869 (1979) ("Younger II"), *review denied*, Aug. 1, 1979; VAN ALSTYNE, *supra* note 43, at 134.

141. For the text of this amendment, *see* Cal. Stats. 1913, at 1730.

142. *See Bradley*, *supra* note 77, at 396-97. Reportedly, a law review article inspired this reform. *See* VAN ALSTYNE, *supra* note 43, at 189, *citing* William Carey Jones, *"Municipal Affairs" in the California Constitution*, 1 CAL. L. REV. 132, 144-45 (1913).

143. *See* West Coast Advertising v. City of San Francisco, 14 Cal. 2d 516, 522 (1939) (city charter is not a grant of power but a restriction upon it); *Butterworth v. Boyd*, 12 Cal. 2d 140, 146 (1938) (same); *Wolff*, *supra* note 42 at 440; *Bank v. Bell*, 62 Cal. App. 320, 329 (1923), *review denied,* July 26, 1923; *see also supra* part I.A.iii.

144. Also, cities that had been chartered specially by the State Legislature could not take advantage of the new Home Rule provisions until they adopted a new charter under the "freeholder" system. *See* VAN ALSTYNE, *supra* note 43, at 191-92, *citing* Civic Ass'n v. Railroad Comm'n, 175 Cal. 441, 444-48 (1917).

state laws, chartered counties enjoy autonomy only over electoral and administrative details.[145]

Section 71/2 did not mention municipal affairs, nor, more properly, "county affairs," so counties did not benefit much from charter-based Home Rule. Only six years after counties gained the option of Home Rule, a California Court of Appeal held that a county as a political subdivision of the state has only those powers specifically delegated to it by the Legislature.[146] Of course, the State Constitution mandates the existence of counties, so there may be a limit to the Legislature's control over them. Still, it is difficult to know where that limit would be. The general rule is that the Legislature may not forbid counties to enact certain regulations, but it may always preempt such regulations.[147]

iii. California Constitutional Reform of the 1960s and 1970s

California continues to operate under its 1879 Constitution. However, by the 1960s, the State Constitution had become top-heavy with amendments. Article XI had become too long and too specific. Amendments had covered every hot issue as it arose. For example, Section 181/4 allowed easy public financing for off-street parking by permitting government agencies to set aside parking meter receipts.[148]

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145. *See* Pearson v. County of Los Angeles, 49 Cal. 2d 523, 536 (1957) (removal and appointment of county officials; *Reuter, supra* note 123, at 326-27 (administrative duties of county officials); Curphey v. Super. Ct., 169 Cal. App. 2d 261, 265 (1959) (appointment and removal of officers by county), *review denied*, May 27, 1959; Lesem v. Getty, 23 Cal. App. 2d 57 (1937); Trebilcox v. City of Sacramento, 91 Cal. App. 257, 263 (1928) ; *also compare, e.g.*, Dibb v. County of San Diego, 8 Cal. 4th 1200, 1210-11 (1994) (*"Dibb II"*) (even if legislature intends to preempt the field of subpoena powers, it may not do so with respect to a county whose charter properly grants subpoena power to county officers) with Board of Supervisors of Butte County v. McMahon, 219 Cal. App. 3d 286, 299 (1990) (home rule county could not escape state mandate to help pay for AFDC grants because public social services are statewide concern).

146. *See* County of Sacramento v. Chambers, 33 Cal. App. 142, 149-50 (1917) (State may delegate duties to counties and take them back at will).

147. As the California Supreme Court explained in 1920:

> [A]n act by the legislature in general terms that the local legislative body would have no power to enact sanitary or other regulations, while in a sense a general law would have for its effective purpose the nullification of the constitutional grant, and therefore, be invalid. [citation omitted] But it was contemplated by the constitution[ ] that the state legislature had the absolute right by general law to enact statutes which would have validity in all parts of the state, . . . and, having done so, local laws in conflict therewith *ipso facto* become void.

Ex parte Daniels, 183 Cal. 636, 641-42 (1920). It is unclear how this rule can be squared with situations where the Legislature acts to forbid local governments from passing laws that would infringe upon a civil right.

148. *See* CAL. CONST. Art. XI, § 181/4 (repealed June 2, 1970).

Relying upon extensive, state-sponsored studies conducted during the 1960s,[149] a Constitution Revision Commission reorganized and simplified Article XI.[150] Voters then approved these changes through a series of referenda and initiatives held during the early 1970s. However, Article XI hardly changed substantively,[151] except as explained below.

C. The Twentieth-Century Decline of California Counties

A state commission assigned to look at the issue in 1930 described counties as the nation's most inefficient, extravagant and wasteful political unit.[152] Whether or not that statement applied in California, at that time counties still served as the main locus of California government. In 1929, total county expenditures topped $263 million, while California cities spent $237 million, and the State only $145 million.[153]

However, California government was evolving. During the twenty years leading up to the Great Depression, California's total population more than doubled, from 2.4 million in 1910 to 5.7 million

149. The two most important studies during this period were conducted by the Governor's Commission on Metropolitan Area Problems and by Professor Arvo Van Alstyne for the California Constitution Revision Commission. Though obviously dated, each of their final reports are well worth reading. *See* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1; VAN ALSTYNE, *supra* note 43.

150. *See Howard Jarvis Taxpayers' Ass'n*, *supra* note 134, at 1370, *citing* Sumner, *Constitution Revision by Commission in California*, 1 WEST. ST. UNIV. L. REV. 48 (1972).

151. *See* CAL. CONST. art. XI, § 13 (stating that distribution of powers between State and local governments shall be construed the same); *Bradley*, *supra* note 77.

However, the Commission's records do raise an interesting aspect of Article XI. Van Alstyne, the Commission's consultant had suggested that the Commission consider amending Article XI to grant cities and counties "residual powers" over any matter upon which the Legislature had not itself passed legislation. *See* VAN ALSTYNE, *supra* note 43, at 255-56. However, a Subcommittee assigned to study the issue recommended against this change, explaining that it thought it too radical. *See* CAL. CONST. COMM'N, ART. XI, LOCAL GOVERNMENT BACKGROUND STUDY, SUPPLEMENT 5, A-37 (1967) (Letter from Subcommittee to Study Residual Powers to Commission Chair). The point deserves only a footnote because it is much less controversial today.

152. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 17.

153. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 103. In contrast, during fiscal year 1995-1996, total county expenditures (excluding San Francisco) were $32.2 billion, *see* KATHLEEN CONNELL, CALIFORNIA STATE CONTROLLER, COUNTIES ANNUAL REPORT, FISCAL YEAR 1995-1996, iii, while California cities (also excluding San Francisco) spent $ 27.2 billion. *See* KATHLEEN CONNELL, CALIFORNIA STATE CONTROLLER, CITIES ANNUAL REPORT, FISCAL YEAR 1995-1996, xx. Over the same period, the State spent $57.8 billion, *see* KATHLEEN CONNELL, CALIFORNIA STATE CONTROLLER, STATE OF CALIFORNIA BUDGETARY/LEGAL BASIS ANNUAL REPORT FOR THE YEAR ENDED JUNE 30, 1996, A-8, nearly as much as all county and city expenditures combined.

in 1930.[154] Although California is large, this growth was highly localized. Over the same 20-year period, Los Angeles County's population quadrupled from approximately 500,000 to over two million.[155]

After a lull during the Great Depression, wartime manufacturing jobs during the 1940s catapulted California into a post-war boom. During the 1950s, the number of people in the San Francisco-Oakland, Los Angeles-Long Beach, Sacramento, San Diego, and San Jose Standard Metropolitan Statistical Areas ("S.M.S.A.'s") grew, respectively, 24, 51, 73, 81 and 116%.[156]

To meet these changes, State officials increasingly performed tasks traditionally left to the counties, while the counties, in turn, offered more municipal services.[157] The counties continued to perform many of their original state functions, like property recordation, tax collection, administration of justice, and road construction. The change was that counties took on new responsibilities, such as managing park lands, providing sanitation services, and operating library systems.[158]

The Constitution of 1879, even as amended, was not designed to handle the metropolitan problems caused by explosive population growth.[159] California counties found themselves caught in transition between their role as administrative instrumentalities of the state and full-fledged local governments.[160] They have never really resolved this schizophrenic existence.[161]

154. *See* U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, Table A 195-209, at 25 (Bicentennial ed. 1975).

155. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 171.

156. *See* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1, at 7. During the same decade, statewide population grew from 10.6 million to 15.8 million.

157. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 88, 139; Winston W. Crouch, *The General Status of Research in Metropolitan Affairs, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 34.

158. *See* BOLLENS & SCOTT, *supra* note 84, at 70; JOHN C. BOLLENS, ET AL., COUNTY GOVERNMENT ORGANIZATION IN CALIFORNIA 1 (rev. ed. 1947); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 139.

159. *See* Winston W. Crouch, *The General Status of Research in Metropolitan Affairs, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 36. The 1880 census shows that California was predominantly rural. SWISHER, *supra* note 1, at 6. There were only eight cities with at least 5,000 residents each, but five of these were along the San Francisco Bay (San Francisco, Oakland, San Jose, Vallejo, and Alameda). *See id.* Still, although San Francisco had over 230,000 people, the next largest (Oakland) had only 35,000, and all five were far enough apart so that regional problems were still unknown.

160. *See* BOLLENS & SCOTT, *supra* note 84, at 70.

161. *C.f.* David R. Berman & Katheryn A. Lehman, *Counties, Change, and Reform: An Overview, in* COUNTY GOVERNMENTS IN AN ERA OF CHANGE xii (David R. Berman, ed., Wesport, CT: Greenwood Press, 1993).

i. Urbanization

Some counties, notably Los Angeles, rose to the challenge.[162] They cut back their numbers of elected officers and appointed chief administrative officers ("C.A.O.'s") to act as county executives.[163] However, California counties could never operate as efficiently as California city governments,[164] nor as flexibly as special districts. New cities sprang up, and California led the nation in its creation of special districts to provide municipal services.[165]

Much of the State's postwar residential and commercial growth came to unincorporated, suburban areas, where land prices were cheaper.[166] Seeking greater autonomy, many of these suburbs incorporated.[167] Boundaries were gerrymandered to exclude poor and minority-inhabited areas and to include high generators of property and sales tax.[168] The City of Vernon was a paradigm, of sorts. In the 1960s, the neighboring City of Los Angeles had 11,000-times its population, but only 20-times its assessed property value.[169]

In 1933, the Legislature reduced the number of signatures needed for an incorporation petition from fifty percent of qualified electors of

162. *See* GEORGE W. BEMIS & NANCY BASCHÉ, LOS ANGELES COUNTY AS AN AGENCY OF MUNICIPAL GOVERNMENT xi (1946) ("The county [sic] of Los Angeles performs more individual functions for its people than [does] any other county in the country."); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 194 (claiming Los Angeles to be best-run county in the United States).

163. *See* BOLLENS & SCOTT, *supra* note 84, at 80-87. The State's Commission on County Home Rule had recommended such a reform well before World War II. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 9, 25. By the late 1960s, 43 of the State's 58 counties had C.A.O.'s. *See* JANE GLADFELDER, CALIFORNIA'S EMERGENT COUNTIES 12-23 (1968).

164. By this time, California cities increasingly had shifted to the city-manager system. *See* BOLLENS & SCOTT, *supra* note 84, at 4, 23-28.

165. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 139, 162.

166. *See id.* For a classic account of the Federal Government's role in America's post-war suburbanization, *see* KENNETH JACKSON, THE CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 190-230 (1985). For the role transportation technologies played, *see* Peter O. Muller, *Transportation and Urban Form: Stages in the Spatial Evolution of the American Metropolis*, *in* THE GEOGRAPHY OF URBAN TRANSPORTATION, at 26-52 (S. Hanson ed., 2nd ed. 1995).

167. A study of city incorporations by the California Assembly's Interim Committee on Municipal and County Government conducted during the late 1950s concluded that there were "no set patterns of motivation to the . . . movement." *See* Cal. Assembly Interim Comm. on Mun. & County Gov't, *Incorporation Practices*, 6 ASSEM. INT. RPTS. 1957-1959 No. 11, 1, 9. Among the motivations identified by the Interim Committee were a fear of annexation by existing cities, and the desires to control local land uses and capture local sales-tax revenue. *See id.*, at 9-12.

168. *See* Sherwood, *Some Major Problems of Metropolitan Areas*, *in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 18-19.

169. *See* VAN ALSTYNE, *supra* note 43, at 26.

the county who were residents within the limits of the proposed city to merely twenty-five percent.[170] During the 1950s, the State Legislature reduced the six classes of non-chartered cities to one.[171] Since then, California law has countenanced only two types of cities, chartered cities (which include chartered cities-and-counties) and general law cities.

From 1954 to 1959, there was a fifty percent increase in the number of cities in the Los Angeles Area, one having fewer than 300 residents.[172] At the beginning of the 1960s, California had a total of 294 general law cities, and 70 chartered cities.[173] In 1940, there had been only 226 and 57 respectively.[174]

Even having captured so much wealth, many of California's new cities were too small to provide their own municipal services. This did not stop them. Under an approach refined[175] by the City of Lakewood and Los Angeles County, small cities contracted with their counties to provide municipal services that their residents needed, like fire and police protection.[176] As an alternative to the "Lakewood Plan,"[177] cities could employ California's Joint Exercise of Powers Act of 1921 to set up separate entities to provide them all with services at

170. *See* PEPPIN II, *supra* note 67, at 315-16.

171. *See* Hanson, *supra* note 125, at 331 n.1 (1961), *citing* Cal. Stats. 1955, ch. 624, p.1114 (May 20, 1955).

172. *See* Sherwood, *Some Major Problems of Metropolitan Areas, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1, at 17.

173. *See* Hanson, *supra* note 125, at 331 n.1.

174. *See* PEPPIN I, *supra* note 79, at 4-5.

175. It would be inaccurate to write "pioneered" instead of "refined." A quarter-century earlier, the State's Commission on County Home Rule suggested that counties be empowered to perform more "municipal functions." *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 10, 91. Already by that time, counties could do so by virtue of a State Constitutional amendment passed in 1914. *See* VAN ALSTYNE, *supra* note 43, at 163. In fact, the roots of the Lakewood Plan run even deeper than that. As early as 1891, certain chartered cities could agree to have counties perform their taxing duties, and in 1895 the privilege was extended to all cities except the State's very largest. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 31, *citing* Cal. Stats. 1891, at 22 ff.

176. Californians surveyed in the Los Angeles area around the year 1960 were more interested in garbage collection and street maintenance than police protection. *See* William B. Storm & Wallace H. Best, *Public Awareness of Metropolitan Problems: Some Survey Research Estimates, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 43.

177. For an early but detailed description of the Lakewood Plan, *see* Mark B. Feldman & Everett L. Jassy, *The Urban County: A Study of New Approaches to Local Government in Metropolitan Areas*, 73 HARV. L. REV. 526, 545-58 (1960).

shared cost.[178] Finally, cities offered each other mutual aid for emergency services.[179] California cities perfected all these techniques.[180]

Also, by the 1940s, State courts had begun to soften Dillon's Rule to resolve all doubts in favor of cities.[181] The political gulf widened between counties and cities. This was especially so between chartered cities and chartered counties, because only the former had autonomy over its municipal affairs.

Special districts made up the final part of the postwar political landscape. These entities provided a quick and relatively cheap way for citizens to secure municipal services.[182] California was not the only state using special districts,[183] but it used them more often and for a wider variety of services, including irrigation, reclamation, water conservation, drainage, levee management, mosquito abatement, schools, highways, and revenue-producing utilities.[184]

By the 1960s, California's present, convoluted structure of local government had taken form. Typically, Californians lived, worked, studied, shopped, drew their water from and emptied their sewage into separate jurisdictions,[185] which did not coordinate their planning with one another. Furthermore, Californian's local taxing jurisdictions and government-service areas did not coincide.[186] This local governmental structure misallocated the tax burdens away from the

178. CAL. GOV'T CODE §§ 6500-99.1 (West 1995); *see also* "An Act providing for the joint exercise of powers by counties, by municipalities, or by municipalities and counties," Cal. Stats. 1921, ch. 363, at 542 (May 20, 1921); City of Oakland v. Williams, 15 Cal. 2d 542, 549 (1940) (cities may contract so that one of them performs services for both). For an example of a separate body organized under the Joint Powers Act. *See* Preamble to By-Laws of the Association of Bay Area governments (1961) (forswearing regulatory power).

179. Professor Sherwood commented that such arrangements could be coercive. *See* Sherwood, *Some Major Problems of Metropolitan Areas, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 95. As an example, Sherwood explained that the City of Los Angeles, out of self-interest, had to help the City of Vernon protect its factories from fire, but that the Vernon Fire Department was all but useless to the City of Los Angeles. *See id.*

180. *See* VAN ALSTYNE, *supra* note 43, at 32.

181. *See, e.g.*, Ravettino v. City of San Diego, 70 Cal. App. 2d 37, 47 (1945) (all doubts about the propriety of means used in exercise of an undoubted municipal power should be resolved in favor of the municipality where there is no abuse of power or discretion), *review denied*, Aug. 27, 1945.

182. *See* BOLLENS & SCOTT, *supra* note 84, at 138.

183. *See* John C. Bollens, *Metropolitan Districts, in* URBAN GOVERNMENT 68 (Edward C. Banfield ed., 1961).

184. *See* BOLLENS & SCOTT, *supra* note 84, at 124.

185. *See* VAN ALSTYNE, *supra* note 43, at 34; Cal. Assembly Interim Comm. on Conserv., Plng., & Pub. Works, Subcommittee on Plng., *A Metropolitan Multipurpose District for California*, 13 ASSEM. INT. RPTS. 1957-1959 No. 24, 1, 31 (1959).

186. *See* VAN ALSTYNE, *supra* note 43, at 34.

true beneficiaries. It also skewed the considerations of local government when they did their land use planning.

ii. Local Agency Formation Commissions (LAFCOs)

Unable to serve their residents by themselves, California municipal officials found ingenious ways to cooperate.[187] Formal regional bodies were tried but usually failed to get far off the ground. For example, the Los Angeles City-County Local Government Consolidation Study Committee was formed during the late 1950s, but it soon died aborning.[188]

In response to battles during the 1960s between cities over the annexation of county land, the State Legislature created local agency formation commissions ("LAFCOs") in every county.[189] LAFCOs serve as the State's direct agents, exercising its delegated legislative powers over the boundary adjustments, annexations, detachments, consolidations, mergers and reorganizations of local governments.[190] The Legislature's stated policy in creating the LAFCO system was to encourage orderly growth and development, with "appropriate consideration" of preserving open space.[191] Furthermore, it was clear decades before the creation of LAFCOs, that special districts complicate local government, create multiple bureaucracies, and burden residents with extra layers of taxes and elections over unknown issues.[192] Through the formation of LAFCOs, the Legislature has expressed its preference for fewer governmental agencies within counties.[193]

187. *See id.* at 249; Sherwood, *Some Major Problems of Metropolitan Areas, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 19; Stanley Scott, *Major Metropolitan Studies and Action Programs in California, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 22, 23.

188. *See* Stanley Scott, *Major Metropolitan Studies and Action Programs in California, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 19, 22, 23.

189. *See* CAL. SEN., COMM. ON LOCAL GOV'T, LAFCO SPHERES OF INFLUENCE AFTER 20 YEARS: THE SUMMARY REPORT OF THE INTERIM HEARING OF THE SENATE COMMITTEE ON LOCAL GOVERNMENT 206 (1991).

190. *See* CAL. GOV'T CODE § 56100 (West 1997) ("[T]his division provides the sole and exclusive authority and procedure for the initiation, conduct and completion of changes of organization and reorganization for cities and districts.").

191. *See* CAL. GOV'T CODE §§ 56001, 56300, 56301 (West 1997).

192. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 163; SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA *supra* note 10, at 74.

193. *See* CAL. GOV'T CODE § 56001 (West 1997) ("The Legislature finds and declares that a single governmental agency, rather than several limited[-]purpose agencies, is in many cases better able to assess and be accountable for community service needs and fi-

Under the scheme's present incarnation, the Cortese-Knox Government Reorganization Act of 1985 ("Cortese-Knox Act"),[194] LAFCOs act after making several determinations[195] supported by substantial evidence[196] gathered by staff. The statutory system is vague but clean. The political reality is uglier:

> [S]phere decisions are highly political. Some landowners and developers will lobby the LAFCO to be included in a city's sphere; others will lobby to be left out. And because developers are major contributors to both city and county election campaigns, the city and county officials who sit on the LAFCO will often try to accommodate them.[197]

Certainly counties have not been above reproach in the LAFCO system. Their officials have clear conflicts of interest in deciding which lands may leave the county's jurisdiction to join a city, and which may not. Still, even with LAFCOs as a weapon, counties fight a losing battle in the annexation process. Conceptually, politically, and fiscally, unincorporated areas—where counties exercise control—are the scraps left over after annexation.

iii. Reapportionment of the California Senate

Originally, statute required both houses of the California Legislature, the Assembly and the Senate, to be apportioned by districts conforming to county lines.[198] In 1926, California voters adopted Proposition 28, amending the State Constitution to apportion the Senate largely on the basis of geography. Proposition 28 introduced a so-called "Federal Plan," which divided the State into 40 senatorial districts, which had to conform to county boundaries.[199] No county was

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nancial resources and, therefore, is the best mechanism for establishing community service priorities.")

194. *See id.* §§ 56000-57550 (West 1997).

195. *See id.* § 56841 (West 1997) (listing factors LAFCO must consider).

196. "Substantial evidence" means evidence that is reasonable, credible and of solid value. See CQL Original Prods., Inc. v. Nat. Hockey League, Players' Ass'n, 39 Cal. App. 4th 1347, 1354 n.4 (1995).

197. *See* CAL. SEN., COMM. ON LOCAL GOV'T, *supra* note 189, at 205, *quoting* FULTON, *supra* note 15, at 238-39.

198. *See* Cal. Stats. 1850, ch. 59, at 154-55 (Apr. 4, 1850). The California Constitution of 1879 changed this, by requiring apportionment on the basis of population. *See* Yorty v. Anderson, 60 Cal. 2d 312, 313 (1963); Silver v. Jordan, 241 F. Supp. 576, 578 (1964), *aff'd*, 381 U.S. 415 (1965).

199. *See* CAL. CONST. art. IV, § 6 (repealed by the Voters, June 30 1980); *Yorty*, 60 Cal. 2d at 313; *Jordan*, *supra* note 201, at 578. For the full text of Proposition 28, Cal. Stats. 1927, at 85, as well as the ballot arguments for and against it, *see Jordan*, 381 U.S. at 416 n.3 (Harlan, J., joined by Black and Stewart, JJ., dissenting from denial of certiorari).

entitled to more than one senator, and no senatorial district could include more than three counties.[200]

In 1963, California had 27 senatorial districts that contained one county, eight contained two counties, and five contained three.[201] This led to strange political results. Most dramatically, the 38th Senatorial district, comprising heavily urbanized Los Angeles County, had 450-times the number of voters (6,380,771 in 1960) as the 28th Senatorial district, comprising the rural counties of Mono, Inyo and Alpine (14,294 in 1960).[202]

In 1964, a federal district court, following the U.S. Supreme Court's decision in *Reynolds v. Sims*[203] that diluting a citizen's vote because of his or her place of residence was as invidious as racial discrimination, rejected arguments that California's size, diversity, interests, and activities could support geographical apportionment of its Senate.[204] The next year, the California Supreme Court ordered the Legislature to reapportion itself on the basis of population in time for the next statewide election.[205]

Today, county boundaries in California are not sacrosanct for apportionment purposes. The State Constitution merely requires that "the geographical integrity of any city, county, or city and county, or

200. *See* CAL. CONST. art. IV, § 6 (repealed by the Voters, June 30 1980); *Yorty*, 60 Cal. 2d 192, 313; *Jordan*, 241 F. Supp at 192, at 578.

201. *See Yorty*, 60 Cal. 2d at 314.

202. *See Jordan*, 241 F. Supp at 578-79.

203. 377 U.S. 513 (1964).

204. *See Jordan*, 241 F. Supp at 584. Writing for the Court in *Reynolds*, then-Chief Justice Earl Warren had explained away the federal Senate as the product of "unique historical circumstances." *See Reynolds v. Sims*, 377 U.S. 513, 574 (1964). In a stunning *non sequitur*, Warren had reasoned that because no conceivable analogy could be drawn between Congress and the reapportionment proposed for the Alabama Legislature, which was at issue in the case, the federal analogy was, therefore, inapposite and irrelevant to *all* state legislative districting schemes. *See id.* at 572-73. In particular, Warren rejected the validity of apportioning State senates by reference to local governments because the latter "never were and never have been considered as sovereign entities." *See id.* at 575. Presumably, Warren was well aware of the principle of Home Rule from his years of public service in California, serving as District Attorney for Alameda County, Attorney General and finally Governor. Yet, Warren seems to have ignored Home Rule entirely in *Reynolds*. In his defense, the Alabama Legislature was grossly malapportioned, and racial animus was at work, so the result in *Reynolds* is beyond reproach. *See id.* at 537-554 (reciting facts and history of case).

205. *See* Silver v. Brown, 63 Cal. 2d 270, 276-77 (1965) (unanimous); Legislature v. Reinecke, 10 Cal. 3d 396 (1973) (unanimous). Currently, the California Constitution requires that electoral districts for the State Senate be reasonably equal in population. *See* CAL. CONST. art. XXI, § 1(b) (adopted by the Voters, June 30 1980); Wilson v. Eu, 1 Cal. 4th 707, 758 (1992) (Appendix: Report and Recommendations of Special Masters on Reapportionment).

of any geographical region shall be *respected to the extent possible.*"[206] In this way, counties have lost considerable political power in the State Legislature.[207] Meanwhile, the makeup of county boards of supervisors has remained relatively unchanged. By statute, non-chartered counties must have five supervisors, no matter how many residents live there.[208]

iv. Proposition 13 and the Redevelopment Game

During the mid-1970s, a speaker at a conference of the County Supervisors' Association of California ("CSAC") told his audience that counties would not survive unless they improved their efficiency.[209] In June 1978, California voters forced the hand of counties and cities alike by approving Proposition 13 ("Prop. 13").

Prop. 13 added Article XIIIA to the California Constitution, which curtails every locality's taxing power by reserving to the State Legislature the power to apportion property tax revenues among the various government entities within counties.[210] To some, Home-Rule powers mean nothing without the power to raise revenue.[211] Formerly, while the taxation powers of counties, general-law cities and special districts were limited to those delegated by the State,[212]

206. CAL. CONST. art. XXI, § 1(b) (adopted by the Voters, June 30 1980) (emphasis added). California is divided into 40 Senatorial and 80 Assembly districts, each one sending a single elected official to the State Capitol. *See id.* art. IV, § 6.

207. Ironically, the California Senate is thought to be less sympathetic to local issues than the Assembly, because, with present term limits, its members stay longer in Sacramento. *See* LEAGUE OF CAL. CITIES, CITIES ON THE CUTTING EDGE: A SYMPOSIUM ON EMERGING MUNICIPAL LEGAL ISSUES, *Keynote Panel*, remarks of Hon. Michael Sweeney, Chair, Cal. Assembly Comm. on Local Gov't (San Francisco, Sept. 20, 1997). The differences between the California Assembly and Senate vindicate Chief Justice Warren's argument in *Reynolds v. Sims* that bicameralism would remain viable even under one-person, one-vote apportionment. *See Reynolds*, 377 U.S. at 579.

208. *See* CAL. GOV'T CODE § 25000 (West Supp. 1998). Empirical studies show that this arrangement correlates to county supervisors' tendency to be more politically conservative than their constituents. *See* CROUCH, ET AL., *supra* note 3, at 237.

209. *As quoted in* CROUCH, ET AL. *supra* note 3, at 227.

210. *See* CAL. CONST. Art. XIIIA, § 1(a) (one-percent cap on *ad valorem* real property taxes), § 4 (prohibiting local governments from imposing local *ad valorem*, sales or transaction taxes on real property).

211. *See, e.g.*, Watchtower Bible & Tract Society v. County of Los Angeles, 30 Cal. 2d 426, 429 (1947) ("[T]he power of taxation for revenue purposes is probably the most vital and essential attribute of the government. Without such power it cannot function."); LEAGUE OF CAL. CITIES, *supra* note 207, *Workshop: Allocating Power Between State and Fed. Gov'ts*, remarks of San Francisco Dep. City Att'y Burk E. Delventhal.

212. *See* Santa Clara County Local Transp. Auth. v. Guardino, 11 Cal. 4th 220, 247-48 (1995), *citing* CAL. CONST. art. XIII, § 24.

chartered cities' municipal-affairs powers[213] included the ability to assess and levy taxes for municipal purposes.[214] However, California courts hold that Prop. 13 does not abrogate Home Rule.[215]

The voters' intent was to limit local taxes permanently, especially local property taxes,[216] which Prop. 13 capped at one percent of the property's full cash value.[217] Prop. 13 also rolled back property assessments to their levels during fiscal year 1975-1976.[218] As a result, most local governments, especially school districts, suffered immediately from severe revenue shortfalls.[219] Before Prop. 13, local elected officials would set policy, determine which segments of the electorate were most suited to pay to support that policy, and then enact taxes accordingly.[220] Afterwards, local policy makers checked their treasuries first.[221]

To take up the slack for counties, the State took control of certain welfare programs, including Aid for Families with Dependent Children ("AFDC") and Medi-Cal.[222] However, the Legislature remained

213. *See infra* part III.A.ii.b.

214. *See West Coast Advertising Co.*, 14 Cal. 2d at 524 (upholding municipal sales and use taxes); *Braun*, 141 Cal. 204 (upholding license and property taxes).

215. *See* Amador Valley Jt. Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 224-27 (1978); County of Los Angeles v. Sasaki, 23 Cal. App. 4th 1442, 1453 (1994), *review denied,* June 23, 1994; *see also* City of Woodlake v. Logan, 230 Cal. App. 3d 1058, 1065 (1991) (local government has no inherent power to tax, citing CAL. CONST. art. XIII, § 24), *abrogated on other grounds as recognized by Howard Jarvis Taxpayers' Ass'n*, 48 Cal. App. 4th at 1367.

216. *See Sinclair Paint Co.*, 15 Cal. 4th at 872; *accord Sasaki*, 23 Cal. App. 4th at 1451.

217. *See* CAL. CONST. art. XIIIA, § 1(a).

218. *See id.*, § 2(a). Real property is reassessed when a change of ownership occurs, *see id.*, unless one of several exceptions apply. *See id.*, § 2(g); CAL. REV. CODE §§ 62-66, 68 (West 1998).

219. In 1977, the year before Prop. 13's adoption, property taxes contributed 22.4%, 36.3% and 67.4% of the revenues of cities, counties, and non-enterprise special districts, respectively. Julie K. Koyama, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L.J. 1333, 1332 n.2 (1991). One year after adoption of Prop. 13, property tax revenues dropped by 51%, a $5.09 billion decrease. *Id.* at 1339; *see also* Terri A. Sexton, et al., *Proposition 13: Unintended Effects and Feasible Reforms*, 52 NAT'L TAX J. 99, 107 (1999) (citing slightly different figures); Peter J. May & Arnold J. Meltsner, *Limited Actions, Distressing Consequences: A Selected View of the California Experience*, 41 PUB. ADMIN. REV. 172, 173 (1981) (study of ten local entities in Northern California). Local shortfalls would have been worse without huge bailouts from the State treasury: $4.2 billion in fiscal year 1978-79, followed by $4.9 billion and $5.5 billion the next two. Koyama, *supra*, at 1339.

220. LEAGUE OF CAL. CITIES, *supra* note 207, *Workshop: Local Government Fiscal Constraints: Predicting the Public Policy Outcomes*, remarks of Richard B. Dixon, Frmr. C.A.O., Los Angeles County.

221. *See id.*

222. *See Sasaki*, 23 Cal. App. 4th at 1451-52.

constitutionally unable to impose taxes for local purposes, although it could authorize local governments to do so.[223] Prop. 13 does permit a locality to impose "special taxes"[224] but only if approved by two-thirds of the electorate.[225] This requirement has proven nearly impossible to meet.[226]

Out of necessity, local governments have had to find other ways to pay for services.[227] One common tactic has been to use benefit assessment districts and fees to generate revenue,[228] because they do not require support by a super-majority vote of the electorate.[229] However, unlike taxes, fees must be supported by both a nexus with the payor's proposed activity, and a rough proportionality between the amount of the fee and the impacts from the proposed activity.[230] Thus, for example, development fees exacted in return for building permits or other governmental privileges are not special taxes, as long as the amount of the fees bear a reasonable relation to the develop-

223. *See* CAL. CONST. Art. XIII, § 24(a).

224. "Special taxes" are those levied for a specific purpose rather than for general governmental purposes. *See* City and County of San Francisco v. Farrell, 32 Cal. 3d 47, 57 (1982).

225. "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except *ad valorem* taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district." CAL. CONST. art. XIIIA, § 4.

226. *See, e.g.*, LEAGUE OF CAL. CITIES, *supra* note 207, *Workshop: Allocating Power Between State and Federal Governments*, remarks of San Francisco Dep. City Att'y Burk E. Delventhal.

227. *See generally* Koyama, *supra* note 219; *see also* Sexton, et al., *supra* note 221, at 107-09.

228. *See* Koyama, *supra* note 219 at 1350-66 (discussing both benefit assessments and fees); Lloyd J. Mercer and W. Douglas Morgan, *California City and County User Charges: a Post Proposition 13 Assessment*, URB. L. & POL'Y 187 (1985) (analyzing cities and counties experience with fees); *see also* Henke, *supra* note 219, at 29 (discussing development fees to pay for school construction). Whether impositions are "taxes" or "fees" is a question of law. *See Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 873-74 (1997) (unanimous). The distinction is frequently blurred, taking on different meanings in different contexts. *See id.* at 874. There are important differences between "taxes" and "fees." Unlike taxes, government imposes fees in return for a specific benefit conferred or privilege granted. *See id.* Also, most taxes are compulsory, but government imposes fees in response to a voluntary decision to develop or to seek other government benefits or privileges. *See id.*

229. The Government Code excludes from its definition of special taxes "any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." CAL. GOV'T CODE § 50076 (West 1983).

230. *See* CAL. GOV'T CODE §§ 66000-29 (West 1997) ["Mitigation Fee Act"]; Ehrlich v. City of Culver City, 12 Cal. 4th 854, 865-67 (1996).

ment's probable costs to the community and benefits to the developer.[231]

The anti-tax lobby remains vigilant and powerful, and even the fee loophole has been partially closed in recent years by passage of Proposition 218 ("Prop. 218").[232] Adopted by the voters in 1996, Prop. 218 added Articles XIIIC and XIIID to the State Constitution, which require voters to approve all special assessments (including benefit assessment districts) and fees or charges that are "property related," and forbids special districts, including school districts, to levy general taxes.[233]

Prop. 13 and the Cortese-Knox Act have spawned sales-tax mercantilism. Because property taxes are so limited, localities have come to rely on sales taxes.[234] When an unincorporated community becomes a city or merges into one, all future sales tax revenues go to the city instead of the county government.[235] Consequently, counties resist attempts by unincorporated areas to incorporate if they contain land uses that generate high sales taxes, such as shopping malls, and justifiably so.[236]

Also, under Prop. 13, property tax assessments increase only if a new project is constructed or if a property changes hands.[237] Under the Community Redevelopment Law,[238] incremental increases in tax revenue can be captured within cities' redevelopment areas so that they are not shared with the county.[239] Therefore, cities often gerrymander the boundaries of redevelopment areas in order to include every property that is likely to be sold or redeveloped in the foreseeable future.[240] The State reimburses school districts for the resulting

231. *See Sinclair Paint*, 15 Cal. 4th at 875. In a victory for planning, the California Supreme Court held in *Sinclair Paint* that the police power is broad enough to include mandatory remedial measures to mitigate the past, present, or future adverse impact of the fee payer's operations, at least where the measure requires a causal connection or nexus between those operations and their adverse effects. *See id.* at 877-78.

232. *Codified as* CAL. CONST. arts. XIIIC, XIIID.

233. *See* CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 201-03 (17th ed., 1997). Prop. 218 defines "fees" or "charges" as "any levy other than an ad valorem tax, a special assessment, or an assessment, imposed by an agency on a parcel or a person as an incident of property ownership, including user fees or charges for a property related service." *See id., citing* CAL. CONST. art. XIIID, § 2(c).

234. *See* FULTON, *supra* note 15, at 233.

235. *See id.* at 212.

236. *See id.* at 233-35; Bd. of Supervisors of Sacramento County v. LAFCO of Sacramento County, 3 Cal. 4th 903, 906 (1992), *cert. denied*, 507 U.S. 988 (1993).

237. *See* FULTON, *supra* note 15, at 251.

238. *See* CAL. HEALTH & SAFETY CODE § 33000-33799 (West Supp. 1998).

239. *See id.*, at 252.

240. *See id.*, at 253.

property-tax shortfalls, but not counties or special districts, which are left to negotiate "pass-through" agreements with cities on their own.[241]

D. Summary of Brief History

While California State government grew more important from the Great Depression onward,[242] urbanization also made California cities more important. In postwar California, the county's role has become increasingly uncertain and marginal.

Even before the advent of Prop. 13, counties had fewer revenue sources than did cities.[243] After Prop. 13, the State took control over real property taxes, which had been local governments' bread and butter.[244] Meanwhile, President Ronald Reagan's administration essentially ended the flow of federal money to local governments.[245] Worse still for local governments, during California's economic recession in the early 1990s, the State Legislature responded to its own budget deficit by enacting the Educational Revenue Augmentation Fund to redirect $3 billion a year in property taxes from cities, counties, and special districts to school districts.[246]

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241. *See id.*, at 255.

242. Pursuant to a constitutional revision adopted by California voters, the State Legislature began to meet full-time after 1966. *See* Walsh v. Bd. of Admin. of the Pub. Employees' Retirement Sys., 4 Cal. App. 4th 682, 691 (1992), *review denied,* June 11, 1992, *cert. denied*, 506 U.S. 981 (1992).

243. For example, cities had business license taxes in addition to the counties' sources, property and sales tax. *See* VAN ALSTYNE, *supra* note 43, at 38. In 1977, counties were far more dependent on intergovernmental transfers, which accounted for about half of their total revenues, than were cities (33.2%). *See* Sexton et al., *supra* note 219, at 107.

244. In fiscal year 1977-78, property taxes made up 33.2% of counties' total revenues, as compared to 11.6% in fiscal year 1995-96. *See* Sexton et al., *supra* note 219, at 107, table 3. Over the same period, the same statistic of cities changed from 12.4% to 5.6%. *Id.*

245. *See* J. Edwin Benton & Donald C. Menzel, *County Services: The Emergence of Full-Service Government, in* LOCAL GOVERNMENT AUTONOMY IN CALIFORNIA 53 (Linda Martin ed., 1984). Federal aid to counties dropped by 73% from 1980 to 1986. *See* Beverly A. Cigler, *The Special Problems of Rural County Governments, in id.*, at 99.

246. *See* Sexton, et al., *supra*, note 219, at 109. A major side effect of Prop. 13 was to force fully centralized state funding of California schools. Henke, *supra* note 228, at 23. Prop. 13 is not the only reason California public schools have changed since the mid-1970s. In its 1971 and 1976 *Serrano v. Priest* decisions, the California Supreme Court invalidated the traditional system of local school financing for violating students' rights to Equal Protection. *See generally id.*; Fabio Silva & Jon Sonstelie, *Did* Serrano *Case a Decline in School Spending*, 48 NAT'L TAX J. 199 (1995); *see also* William A. Fischel, *How* Serrano *Caused Proposition 13*, 12 J.L. & POL. 607 (1996); William A. Fischel, *Did* Serrano *Cause Proposition 13?*, 42 NAT'L TAX J. 188 (1995). In any event, the State now apportions 53% of its $20 billion in annual property tax revenues to school districts, as compared to the 18% shares it gives to both counties and special districts, and 11% to cities. *Id.* at 109.

In the resulting fiscal crisis, cities have proven more resilient than counties, in part by incorporating neighborhoods and businesses selectively, and manipulating the redevelopment process to capture both sales-tax revenue and property-tax increments.[247] Meanwhile, counties have been less able than cities to generate revenue by using fees instead of property taxes.[248] In this climate, it seems that counties have been too financially strapped to embrace a regional-planning role.

Without a formal institution to guide them, California cities nevertheless have found ways to cooperate, through methods such as the Lakewood Plan or the Joint Exercise of Powers Act. In addition, California city residents have long benefited from capable civil servants who provide relatively high-quality city services.[249] Lastly, Home Rule helps serve democracy by bringing political decisions geographically and practically closer to the individual California citizen.

Unfortunately, California's regional problems remain unaddressed because cities decide if and when they will cooperate. While economic and political factors motivate cities, California's legal structure gives them the freedom to address issues or to ignore them. This is why the law matters. The following section describes the legal framework of California county government.

III. The Legal Framework of California County Government

In today's political scheme, California counties are almost vestigial. This has come about because of the growth of other political organs. However, it is not constitutionally preordained. The Legislature could make counties virtually as powerful as itself, without going before the voters. The reluctance of citizens to cede local control to regional entities has frustrated previous attempts to solve metropolitan problems. Counties' constitutional status allows the Legislature to avoid this obstacle.

247. Since passage of Prop. 13, the number of redevelopment agencies has more than doubled, to reach 400 during 1996-97. Sexton et al., *supra* note 219, at 108. However, there is no evidence that Prop. 13 has caused an increase in the number of cities and special districts. *Id.* at 109.

248. *See* Mercer & Morgan, *supra* note 227, at 204. By 1995, intergovernmental transfers had grown to make up a 64% share of counties' total revenues, compared to a mere 13% share of cities' total revenues. Sexton et al., *supra* note 219, at 107.

249. "[S]tructure never tells the whole story. I am convinced that the large number of fine career professionals in our local government has done much to bring about a unity of approach that the organization charts do not reveal." *See* Sherwood, *Some Major Problems of Metropolitan Areas, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, *supra* note 1, at 19.

Although California law affords its local governments considerable autonomy, the State Legislature ultimately has paramount authority over land use policy. Setting the boundary lines between local jurisdictions is a statewide concern. Also, only the State is sovereign, and the Legislature alone decides when it will delegate such power to local government. Counties are subdivisions of the state, rendering them the natural agents for such delegation.

In this context, federal law is almost entirely irrelevant.[250] Local California governments interact on the basis of State constitutional and statutory law. Californians may therefore improve their situation by looking to their own laws, and reforming them where necessary.

A. County Government Under Current California Constitutional Law

In California, all "political power" inheres in the People,[251] who reserve to themselves the powers of initiative and referendum.[252] With these exceptions, the State's entire power to make law is vested in its Legislature.[253] Given this scheme, it has been held that there is no inherent right of local self-government in California.[254]

250. *See* Railroad Comm'n of Cal. v. Los Angeles Railway Corp., 280 U.S. 145, 152 (1929) ("This court is bound by the decisions of the highest courts of the States as to the power of their municipalities."); Claiborne County v. Brooks, 111 U.S. 400, 410 (1884) (extent and character of powers of political and municipal organizations relate to state constitutions); Kelly v. City of Pittsburgh, 104 U.S. 78, 81 (1881) ("Whether territory shall be governed for local purposes by a county, a city or a township organization, is one of the most usual and ordinary subjects of state legislation."); *see also* Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933) (city may not invoke Privileges and Immunities Clause against its own state); City of Newark v. State of New Jersey, 262 U.S. 192, 196 (1923) (city may not bring claim against own state under Equal Protection Clause to Fourteenth Amendment); City of Trenton v. State of New Jersey, 262 U.S. 182, 188-92 (1923) (diversion of water from city use by its state is not a taking of property because it is a governmental affair); Hunter v. City of Pittsburgh, 207 U.S. 161, 177 (1907) (City may not bring claim against own state under Contracts Clause).

But see also Gomillion v. Lightfoot, 364 U.S. 339, 343 (1960) (Court has rejected only two classes of federal claims made by cities against their states: boundary disputes invoking the Contracts Clause or the Due Process Clause of the Fourteenth Amendment, and claims that loss of municipal identity causes serious economic damage). Another important exception may be the federal Voting Rights Act., 42 U.S.C. §1973.

251. U.S. CONST. art. II, § 1.

252. *See id.* art. II, § 11.

253. *See id.* art. IV, § 1; Pacific Legal Foundation v. Brown, 29 Cal. 3d 168, 180 (1981); *see also* Los Angeles Metro. Transp. Auth. v. Public Util. Comm'n, 59 Cal. 2d 863, 868 (1963).

254. *See* Golden Gate Bridge & Highway Dist. v. Felt, 214 Cal. 308 (1931); *accord* Williams v. City of San Carlos, 233 Cal. App. 2d 290, 331 (1965); *see also* Howard Lee McBain, *The Doctrine of an Inherent Right of Local Self-Government: I*, 16 COLUM. L. REV. 190, 208 (1916) (distinguishing as dictum contrary language in People v. Lynch, 51 Cal. 15). For two famous cases where state supreme courts implied the existence of such a right *see*

Nevertheless, the State Constitution mandates the creation of counties to administer state law,[255] and, within counties, it permits the creation of cities.[256] Every county and city possesses the police power, albeit subject to preemption by the Legislature,[257] which is an attribute of sovereignty.[258] Moreover, the State Constitution permits chartered counties and cities to immunize themselves from State control in certain areas of local interest. This implies some right to local self-government.[259] Counties are at the center of this tangled web of legislative authority, particularly in the area of land use controls.

i. County Police Power

As a subdivision of the State,[260] a California county conducts the

People *ex rel.* Le Roy v. Hurlbut, 24 Mich. 44 (1871) (Cooley, J.) *and* Higginson v. Treas. of Schoolhouse Comm'rs of Boston, 212 Mass. 583, 99 N.E. 525 (1912).

255. *See* CAL. CONST. art. XI, § 1(a) ("The State is divided into counties . . . ."); *Cleland*, 52 Cal. App. 2d at 535 (Legislature must provide for county boards of supervisors and certain other county officers); 16 Cal. Att'y Gen. Op. 79, 81 (1950) (same).

256. *See* CAL. CONST. art. XI, § 2(a) ("The Legislature shall prescribe uniform procedure for city formation and provide for city powers."); *McClellan*, 119 Cal. App. 2d at 142 (*quoting Kahn*, 114 Cal. at 319), *review denied*, Sept. 4, 1953.

257. *See* CAL. CONST. art. XI, § 7.

258. *See* McKay Jewellers, Inc. v. Bowron, 19 Cal. 2d 595, 600 (1942).

259. *See generally* PEPPIN I, *supra* note 79, at 30-32 (asserting that the contrary language in *Lynch* was holding, and expressly rejecting Professor McBain's view

260. *County of Marin.*, 53 Cal. 2d at 638; *accord* County of Los Angeles v. Riley, 6 Cal. 2d 625, 627-28 (1936); Estate of Miller, 5 Cal. 2d 588, 597 (1936); Reclamation Dist. No. 1500 v. Sup. Ct. in and for Sutter County, 171 Cal. 672, 679 (1916); *Coburn*, 130 Cal. at 636-37; *Kahn*, 114 Cal. at 319; Tyler v. Tehama County, 109 Cal. 618, 621 (1895); *People* ex rel. *Graves*, 81 Cal. at 498; *Sharp*, 34 Cal. at 290; *Hunsacker*, 5 Cal. at 290; Sacramento Mun. Util. Dist. v. County of Solano, 54 Cal. App. 4th 1163, 1166 (1997); Community Mem. Hosp. v. County of Ventura, 50 Cal. App. 4th 199, 209 (1996), *review denied*, Nov. 13, 1996; Vagim v Bd. of Supervisors of the County of Fresno, 230 Cal. App. 2d 286, 290(1964); County of Los Angeles v. City of Los Angeles, 212 Cal. App. 2d 160, 164 (1963), *review denied*, Mar. 20, 1963; *McClellan*, 119 Cal. App. 2d at 142-43; *Otis*, 52 Cal. App. 2d 605; Wilkinson v. Lund, 102 Cal. App. 767, 772 (1929), *review denied*, Feb. 24, 1930; Dillwood v. Riecks, 42 Cal. App. 602, 607 (1919), *disapproved on other grounds by Guidi*, 41 Cal. 2d 623; *see also* CAL. CONST. art. XI, sec. 1(a); CAL. GOV'T CODE § 23002 (West 1988); *Chambers*, 33 Cal. App. at 149 ("All the people of the state, while not directly interested in the administration of the affairs of municipal corporations of which they are not members, are so interested in the administration of the governmental affairs of a county, whether they reside there or own property there or not . . . ."); Baldwin v. County of Tehama, 31 Cal. App. 4th 166, 175 (1994) (statutory references to "the State" may include counties), *review denied*, Mar. 17, 1995; *c.f.* United States v. Certain Parcels of Land in Riverside County, 67 F. Supp. 780, 798 (C.D. Cal. 1946) (a California county is not a corporation and cannot sue or be sued except where specifically permitted by statute).

But c.f. CAL. GOV'T CODE § 23003 (West 1988) ("A county is a body corporate and politic . . . .") 20 Cal. Att'y Gen. Op. 69, 70 (1959) (a county is an agency of the state for many purposes, but it is a distinct legal entity from the State and is not part of the latter's executive branch).

State's political affairs on a local level.[261] Whether or not the Legislature delegates such authority, a county may make and enforce within its boundaries all ordinances and regulations not in conflict with general laws.[262] Among these is the power to zone for land uses.[263] The same section of the California Constitution endows cities with identical police powers within their own geographical limits.[264] It follows that a county's planning and zoning power extends only within that portion of its territory not incorporated within a city.[265]

261. *See Orange County*, 97 Cal. at 331; *County of Los Angeles*, 212 Cal. App. 2d at 164.

But see also Guidi, 41 Cal. 2d 623 (counties do not always act in governmental capacity but sometimes in proprietary capacity).

262. *See* CAL. CONST. art. XI, § 7; *Candid Entertainers,* 39 Cal. 3d at 885; *accord Hall*, 47 Cal. 2d at 184; *Pulcifer*, 29 Cal. 2d at 261; *In re* Mingo, 190 Cal. 769, 772 (1923); *see also Daniels*, 183 Cal. at 641-42 (Legislature may supplant local police power ordinances with statutes but it may not forbid their passage).

But see CAL. GOV'T CODE § 23003 (West 1988) ("A county is a body corporate and politic, [and] has the powers specified in this title and such others necessarily implied from those expressed."); San Vincente Nursery Sch. v. County of Los Angeles, 147 Cal. App. 2d. 79, 85 (1956) (same); *see also* Watson v. Greely, 67 Cal. App. 328, 337 (1924) (Legislature uses its general laws to apportion and delegate only specified functions to counties).

263. *See Hurst*, 207 Cal. at 138 (zoning ordinance is a police measure); Dwyer v. City Council of Berkeley, 200 Cal. 505, 511-12 (1927) (same); Wesley Inv. Co. v. Alameda County, 151 Cal. App. 3d 672, 675 (1984).

264. *See* Simpson v. City of Los Angeles, 40 Cal. 2d 271, 278 (1953); *accord McKay Jewellers,* 19 Cal. 2d at 600; *Jardine*, 199 Cal. at 68; *In re* Kazas, 22 Cal. App. 2d 161, 165 (1937).

265. *See Pfirrman*, 134 Cal. at 145 (county and city have mutually exclusive jurisdiction); *Ex parte* Roach, 104 Cal. 272, 275 (1894) (city ordinances supersede ordinances of its county upon same subject); *Campbell*, 74 Cal. at 25 (county's ordinances are not general law within meaning of the State Constitution); City of Dublin v. County of Alameda, 14 Cal. App. 4th 264, 274-75 (1993) (California Constitution specifies that county may exercise its police power only in its unincorporated territory), *review denied*, June 3, 1993; City of South San Francisco v. Berry, 120 Cal. App. 2d 252, 253 (1953) (county's zoning no longer applies in area once annexed by a city); Miller v. Fowle, 92 Cal. App. 2d 409, 419 (1949) (City of Oakland may not accept dedication of streets lying within City of Berkeley); Coelho v. Truckell, 9 Cal. App. 2d 47, 55 (1935); *In re* Knight, 55 Cal. App. 511, 513-14 (1921) (county ordinances effective only within county borders); People v. Velarde, 45 Cal. App. 520, 524 (1920) (county ordinances work only locally); 28 Cal. Att'y Gen. Op. 282, 283 (1956) (a county's exercise of its police power is circumscribed not by subject matter but geographically); VAN ALSTYNE, *supra* note 43, at 305-06, *citing* PEPPIN IV, *supra* note 96, at 689-90 *c.f.* City of Oakland v. Brock, 8 Cal. 2d 639, 641 (1937) (city has no governmental powers beyond its own boundaries); Ferran v. City of Palo Alto, 50 Cal. App. 2d 374, 379 (1942) (city's ordinances have no extraterritorial effect without express permission of the sovereign power);

But see In re Blois, 179 Cal. 291, 296 (1918) (conceding that municipalities may exercise certain extraterritorial powers when their possession and exercise are essential to the proper conduct of its affairs, such as building and maintaining a system of waterworks or inspecting dairies that supply milk to its inhabitants).

ii. Charter-Based Home Rule

In certain subject areas, the California Constitution also allows counties and cities to insulate themselves from preemption by adopting charters. However, charter-based Home Rule creates only a limited form of autonomy, which differs depending on whether the chartered entity is a county or a city. Neither chartered counties nor chartered cities may contradict state legislation affecting a "statewide concern."[266] For example, housing and housing supply is such an issue,[267] requiring localities to comply with state statutes relating to it.[268]

a. Chartered counties are marginally autonomous.

Chartered counties in California have all the powers of general law counties.[269] Moreover, the State Constitution declares that

266. *See, e.g.,* Lesher Communications, Inc. v. City of Walnut Creek, 52 Cal. 3d 531, 547 (1990) (zoning and planning); Professional Fire Fighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 294-95 (1963) (firefighters' right to unionize); Pacific Tel. & Tel. Co. v. City and County of San Francisco, 51 Cal. 2d 766, 774 (1959) (telecommunications); Eastlick v. City of Los Angeles, 29 Cal. 2d 661, 665-68 (1947) (municipal tort liability); *Hall, supra* note 17, 47 Cal. 2d at 179 (public schools); Henshaw v. Foster, 176 Cal. 507, 512 (1917) (regional water supply); Pixley v. Saunders, 168 Cal. 152, 160 (1914) (sewerage system for more than one city); Redevelopment Agency of City of Berkeley v. City of Berkeley, 80 Cal. App. 3d 158, 169 (1978) (redevelopment of blighted areas); Wilson v. City of San Bernardino, 186 Cal. App. 2d 603, 611 (1960) (any public improvement involving more than one city); People *ex rel.* Dept. of Pub. Works v. City of Los Angeles, 179 Cal. App. 2d 558, 566 (1960) (State highway system); County of San Mateo v. City Council of Palo Alto, 168 Cal. App. 2d 220, 221 (1959) (extramural annexation to city); Fellom v. Redevelopment Agency, 157 Cal. App. 2d 243, 247 (1958) (urban redevelopment), *cert. denied*, 358 U.S. 56 (1958); Cralle v. City of Eureka, 136 Cal. App. 2d 808, 811 (1955) (recordation of real property); *In re* Shaw, 32 Cal. App. 2d 84, 87 (1939) (judicial system and jurisdiction over crimes); Peterson v. Bd. of Supervisors of Solano County, 65 Cal. App. 670, 677-78 (1924) (reclamation of land); *see also* Smith, *San Francisco Bay: Regional Regulation for its Protection and Development, supra* note 87, at 762 nn.171-7, 763 nn.176-79, 765 n.189, 766 n.163 (citing some of these cases and others in which courts found at stake a "larger municipality," a "statewide purpose," or activity with "extramunicipal effects").

267. *See* CAL. GOV'T CODE § 65580(a) (West 1997); Buena Vista Gardens Apartments Ass'n v. City of San Diego Planning Dept., 175 Cal. App. 3d 289, 306-07 (1985).

268. *See Lesher Communications,* 52 Cal. 3d at 546-47. The Legislature has anticipated and forbidden cities from using growth control ordinances to limit their obligations to help address the State's pressing housing needs. *See* CAL. GOV'T CODE § 65584(d)(1) (West 1997); *See also* CAL. EVID. CODE § 669.5(a) (growth control ordinances limiting number of building permits for residential uses is presumed to impact supply of residential units available in the area); *id.* § 669.5(b) (city bears burden of proof that growth control ordinance is "necessary' to protect public health, safety, or welfare of its population); Murphy v. City of Alameda, 11 Cal. App. 4th 906, 912-13 (1992) (city must prove *present* necessity, not necessity at time of ordinance's passage), *review denied*, Mar. 11, 1993.

269. *See* CAL. CONST. art. XI, § 4(h) (chartered counties must have all the powers that are provided for them by the State Constitution or by statute).

county charters "supersede all laws inconsistent" with them.[270] It is not immediately clear whether "all laws" refers to state statutes or county ordinances.[271]

However, other provisions of the State Constitution help clarify the issue. Among other things, every county charter must provide for the "powers and duties of governing bodies and all other county officers . . . ."[272] Additionally, a county's charter supersedes general laws adopted by the Legislature to provide for "county powers."[273] Read together, these two provisions could mean that a chartered county has the power to supersede the Legislature's definition of its powers.[274]

Although this may be the syntactical meaning, in practice, California chartered counties do not have this much autonomy.[275] This lack of autonomy is due, in part, to the conceptual difference between a county and a city. Whereas the State creates counties as its legal subdivisions, it is the residents of a given area who choose to incorporate as a city, which seems to imply greater autonomy for cities.[276] Nor does a county become a municipal corporation by adopting a freeholders' charter.[277]

The problem with this line of analysis is that by statute the Legislature does not create counties unless local residents so petition.[278]

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270. *Id.* § 3(a).

271. However, the State Constitution does specify that the term "laws" must be construed as a continuation and restatement of those terms as used in the Constitution in effect immediate prior to June 2, 1970. *See* CAL. CONST. art. XI, § 13.

272. *Id.* § 4(e).

273. *See Id.* § 4(f)-(g).

274. *See Reuter*, 220 Cal. at 320-21, 326-27 (duties delegated by the State to one county officer may be reassigned to another by county charter). I am not the only one who has thought so. *See, e.g.*, VAN ALSTYNE, *supra* note 43, at 41, 141-43, *citing Estate of Miller*, 5 Cal. 2d at 592 ("a county may, in its charter, provide for the powers and duties of its officers, and may do this without limitation by the general law").

275. *See* Dibb v. County of San Diego, 29 Cal. App. 4th 159, 166 (1993) ("*Dibb I*"), *aff'd, Dibb II*, *supra* note 145; *Wilkinson*, 102 Cal. App. at 770; Sato, *"Municipal Affairs" in California*, *supra* note 132, at 1115.

Through loose language, the California Supreme court implied in *In re* Hubbard, 62 Cal. 2d 119, 128 (1964), *overruled in part by* Bishop v. City of San Jose, 1 Cal. 3d 56, 63 n.6 (1969), that counties have Home Rule powers equal to those of cities. *See* Sho Sato, *Municipal Occupation Taxes in California, the Authority to Levy Taxes and the Burden on Intrastate Commerce*, 53 CAL. L. REV. 805, 808 n.42 (1965). On at least this point, *Hubbard* is completely erroneous. *See* Sato, *"Municipal Affairs" in California*, *supra* note 132, 1072-74, 1115.

276. *See supra* part II.A.ii.

277. *McClellan*, 119 Cal. App. 2d at 142 (holding that chartered County of San Diego has no control over incorporation of sixth-class City of Carlsbad).

278. *See, infra*, notes part III.B.i.

Nevertheless, it is now beyond question that a California county that adopts a charter gains autonomy over only electoral and administrative details.[279] Given that general law counties already enjoy this much flexibility, one wonders why a county would bother adopting a charter at all.[280]

b. Chartered cities are autonomous in their "municipal affairs."

In contrast to counties, California cities may adopt charters that enable them to make and enforce all legislation regarding "municipal affairs."[281] This gives them greater autonomy[282] because powers granted in their charters must supersede all inconsistent state laws in that area.[283] It is unsettled whether the Legislature retains concurrent jurisdiction over municipal affairs. In other words, if the laws of a chartered city do not address a particular municipal affair, it does not necessarily follow that State law on that issue controls.[284]

The extent of a chartered city's autonomy turns on the meaning of "municipal affairs." The State Constitution includes a non-exclu-

279. *See* VAN ALSTYNE, *supra* note 43, at 144, *citing, e.g., Pearson*, 49 Cal. 2d 523 (county civil service procedures to dismiss deputy sheriff after felony conviction); Hedlund v. Davis, 47 Cal. 2d 75 (1956) (elections to fill vacancies); Kelly v. Kane, 34 Cal. App. 2d 588 (1939) (county purchasing agents); *see also Dibb II*, 8 Cal. 4th at 1210-11 (even if legislature intends to preempt the field of subpoena powers, it may not do so with respect to a county whose charter properly grants subpoena power to county officers); *McMahon*, 219 Cal. App. 3d 286 (home rule county could not escape state mandate to help pay for AFDC grants); *Younger II*, 93 Cal. App. 3d at 869; *see also Koster*, 157 Cal. at 420 (City and County of San Francisco's power over municipal affairs relate only to city functions, not county functions like court administration); *c.f. also Professional Fire Fighters,* 60 Cal. 2d 276 (State has complete control over city firefighters' right to unionize).

But see City of Dublin, 14 Cal. App. 4th at 285 n.15 (enumeration in constitution of specific provisions that must appear in county charters does not imply the preclusion of all else).

280. *See* VAN ALSTYNE, *supra* note 43, at 144-45. Also, the Legislature approves county charters, so, theoretically, it could exercise a veto over their contents. *See* CAL. CONST. art. XI, § 4(g). However, the Legislature has never vetoed a charter submitted to it. *See* VAN ALSTYNE, *supra* note 43.

281. CAL. CONST. art. XI, § 5(a).

282. *See* VAN ALSTYNE, *supra* note 43, at 234, *citing* City of Roseville v. Tulley, 55 Cal. App. 2d 601, 605 (1942) (chartered cities more autonomous than general law cities or chartered counties by virtue of their superseding power over municipal affairs), *review denied,* Jan. 14, 1943.

283. *See Butterworth*, 12 Cal. 2d at 146 (city is supreme in area of municipal affairs even if its charter is silent on a particular matter); Cramer v. City of San Diego, 164 Cal. App. 2d 168, 170-71 (1958).

284. *Compare* City of Sacramento v Adams, 171 Cal. 458, 461 (1915) [State law controls] *with Bradley*, 4 Cal. 4th at 399 n.9 [conflict possible even where city's charter is silent].

sive[285] list: (1) the makeup, regulation, and management of city police forces; (2) "subgovernment"[286] in all or part of a city; (3) conduct of city elections; (4) the manner and method in which a city elects, appoints, pays or removes its municipal officers; and (5) the qualifications, methods of appointment, tenure, removal and number of deputies, clerks and other city employees.[287] Otherwise, the definition is not fixed[288] or exact.[289]

California courts, not the Legislature,[290] define municipal affairs case by case, by looking at their dialectical opposite, "statewide concerns."[291] If the subject of a state law fails to qualify as one of statewide concern, by default a chartered city's conflicting ordinance on the same subject is a municipal affair.[292] Conversely, if there is a convincing basis in "extramural concerns" for the statute, and the statute is reasonably related and narrowly tailored to resolve those concerns, then the matter is not a municipal affair.[293]

c. Chartered cities-and-counties are like chartered cities.

Finally, the State Constitution allows formation of a chartered entity that is both city and county, although San Francisco is the only one.[294] Bolstering the notion that chartered cities are more powerful than chartered counties, San Francisco's chartered city powers supersede conflicting chartered county powers.[295] However, because a combined city-and-county has territorial jurisdiction exclusive of other

285. *See Bradley*, 4 Cal. 4th at 398, *citing Wolff*, 84 Cal. App. 2d at 442-43.

286. Before Article XI's overhaul in 1970, subgovernments were known as "boroughs." Borough government had been constitutionally possible in California since last century, but attempts to use them never succeeded. For example, the City of Los Angeles had intended to make the City of San Pedro one of its boroughs after annexation but it did not happen. *See* VAN ALSTYNE, *supra* note 43, at 233. Reporting to the Constitution Revision Commission in 1967, Professor Van Alstyne doubted that chartered cities had an inherent right to create boroughs. *See id.* However, as currently written, Article XI leaves no doubt that boroughs are a "municipal affair." *See* CAL. CONST. REV. COMM'N, PROPOSED REVISION 2, 71-72 (1968).

287. *See* CAL. CONST. art. XI, § 5(b).

288. *See Bradley*, 4 Cal. 4th at 400 n.12; *Pacific Tel & Tel.*, 51 Cal. 2d at 771; *Younger II*, 93 Cal. App. 3d at 497-98.

289. *See Bradley*, 4 Cal. 4th at 398.

290. *See id.* at 405.

291. *See id.* at 400 ("As applied to state and charter city enactments in actual conflict, 'municipal affairs' and 'statewide concern' represent, Janus-like, ultimate legal conclusions rather than factual descriptions.").

292. *See id.* at 399.

293. *See id.* at 399-400.

294. *See* CAL. CONST. Art. XI, § 6(b).

295. *See id.*; *Kahn*, 114 Cal. at 319, 322 ("Geographically, [San Francisco] is one of the legal subdivisions of the state .... Politically, it is regarded in [the State Constitution] as a

counties', for certain State purposes[296] it is a county and has county officers.[297]

iii. State Power Over Land Use Planning

As previously discussed, where there is no conflict with general laws, a California locality's police power within its territory is as broad as the State Legislature's.[298] For example, in the area of land use, a locality may use its police power to regulate mere aesthetics.[299] However, planning and zoning are a statewide concern, and therefore are not municipal affairs.[300] This means that not even a chartered California city may adopt a zoning ordinance that conflicts with the State Planning and Zoning Law.[301] In short, the State may preempt the

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municipal corporation."); *see also Martin*, 126 Cal. at 412 (provisions of constitution applying to counties do not apply to City and County of San Francisco).

296. *See id.* at 326:

> It would not be contended if the city was only a portion of the county, or if the county should be composed entirely of incorporated cities, that the state would be precluded from authorizing the election, by voters of the county, of officers to carry out those provisions of its laws which pertain to the state at large, and which have no connection with municipal affairs; and this rule is not changed where the county consists of a single city instead of several.

297. Such officers include district attorney, sheriff, county clerk, county recorder and county coroner. *See Kahn*, 114 Cal. at 335; *see also Koster*, 157 Cal. at 420 (City and County of San Francisco's power over municipal affairs relate only to city functions, not county functions like court administration); *c.f. also Professional Fire Fighters*, 60 Cal. 2d 276 (State has complete control over city firefighters' right to unionize). As already noted above, a California county that adopts a charter gains autonomy over only electoral and administrative details. *See supra* note 267. Such details have been held to include county civil service procedures to dismiss a deputy sheriff after his felony conviction, elections to fill vacancies in county offices, the duties of county purchasing agents, and the subpoena powers of county officers. *See id.*

298. *See* Candid Enters. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 885 (1985) (School Facilities Act does not preempt local governments from imposing school-impact fees to finance facilities), *citing* Birkenfield v. City of Berkeley, 17 Cal. 3d 129, 140 (1976); *Jardine*, 199 Cal. at 68.

299. *See Ehrlich*, 12 Cal. 4th at 886 (plurality), 902 (Mosk, J., concurring), 907 (Kennard, J., joined by Baxter, J., concurring in part and dissenting in part), 912 (Werdegar, J., concurring in part and dissenting in part) (unanimously upholding monetary exaction for artwork as condition of project approval).

300. *See Lesher*, 52 Cal. 3d at 547; Johnston v. Bd. of Supervisors of Marin County, 31 Cal. 2d 66, 75 (1947).

But see Younger I, 5 Cal. 3d at 498 n.18 ("We do not, of course, say that planning and zoning are in all instances matters of more than local concern; we merely hold that under the instant facts [*i.e.* protection of the Lake Tahoe Basin] they are of regional significance.")

301. Although the State Planning and Zoning Law requires a general law city's zoning ordinances to be consistent with its general plan, *See* CAL. GOV'T CODE § 65860 (West 1997), a chartered city's zoning ordinances need not be. *See id.* § 65803 (West 1997); Garat

land use regulations of *every* local government, city or county, chartered or not.[302]

a. The State may preempt local legislation expressly or impliedly.

California courts recognize two types of preemption: express and implied. The question of express preemption turns on whether the purportedly occupied field encompasses the ordinances.[303] In other words, where the State has completely occupied the subject matter, a locality is expressly preempted from legislating.[304] In contrast, courts use three different tests to determine implied preemption, making the question fairly unpredictable.[305]

Still, the California Supreme Court has ruled that in all cases preemption occurs only where there is an irreconcilable conflict between state and local law.[306] If that language is too broad, the State Supreme Court has also ruled that courts should be hesitant to find preemption by implication where local conditions can vary substan-

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v. City of Riverside, 2 Cal. App. 4th 259, 280-84 (1991), *overruled in part on other grounds by* Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 744 n.11 (1994).

But see CAL. GOV'T CODE § 65860(d) (West 1997) (City of Los Angeles' zoning ordinances must conform to its general plan).

302. *See Hurst*, 207 Cal. at 138 (general law cities subject to Legislature's general laws); *c.f. City of San Mateo*, 9 Cal. 2d at 7 (chartered cities subject to Legislature's general laws when "municipal affairs" not at issue); Kehoe v City of Berkeley, 67 Cal. App. 3d 666, 673-75 (1977) (Community Redevelopment Law preempts local zoning and planning laws where they conflict) *review denied*, Mar. 17, 1977; *Redevelopment Agency of City of Berkeley*, 80 Cal. App. 3d at 169 (State Legislature has manifested intent to preempt field of community development).

303. If the field is defined narrowly, preemption is circumscribed; if it is broad, the exemption is expanded. *See Morehart*, 7 Cal. 4th at 748, *quoting Candid Enters.*, 39 Cal. 3d at 886 n4; *see, e.g.*, Channing Properties v. City of Berkeley, 11 Cal. App. 4th 88, 94 (1992) (Ellis Act-Cal. Gov't Code § 7050 *et seq.*-preempts local action with regard to substantive controls over landlords who wish to withdraw all accommodation from residential market).

304. *See supra*, note 299.

305. The three tests are: (1) Subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) Subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; and (3) Subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality. *See Morehart*, 7 Cal. 4th at 751, *citing* Fisher v. City of Berkeley, 37 Cal. 3d 644, 707-09 (1984), *appeal dismissed in part, probable jurisdiction noted*, 471 U.S. 1124 (1985), *aff'd* 475 U.S. 260 (1986). Despite the breadth of these tests, courts will not read procedural requirements imposed upon a "local legislative body" to imply preemption of the electorate's ability to ignore the requirements through initiative or referendum. *See* DeVita v. County of Napa, 9 Cal. 4th 763, 785-86 (1995).

306. *See* California Fed. Savings & Loan Ass'n v. City of Los Angeles, 54 Cal. 3d 1, 16-17 (1991).

tially from one jurisdiction to another.[307] In practice, this leaves considerable room for localities to enact their own land use controls.

b. The State may delegate some of its power to counties or cities.

The federal government may not use regulation to compel the states, its fellow sovereigns, to do its bidding.[308] In contrast, the California Legislature may enact legislative schemes in which chartered cities act as their agents.[309] Thus, the Legislature may require its legal subdivisions, or any other local government agency, including chartered cities, to perform State functions.[310] Courts do not care if the Legislature is fickle in the exercise of this power. The State may

307. *See Fisher*, 37 Cal. 3d at 707, *citing* Gluck v. County of Los Angeles, 93 Cal. App. 3d 121, 133 (1979).

308. *See* Printz v. United States, 521 U.S. 898, 117 S.Ct. 2365 (1997); *c.f. Gibbons*, 22 U.S. at 207 ("Congress cannot enable a state to legislate . . .").

Of course, Congress may use its powers under the Spending Clause to reach the same result. See South Dakota v. Dole, 483 U.S. 203 (1987). For example, the Airports and Airways Improvement Act of 1982 ("A.A.I.A.") uses federal funds as a carrot to further federal aviation policy. Under the A.A.I.A., the Secretary of Transportation can approve a grant for airport development only if the Secretary receives satisfactory, written assurances that, among other things, the airport will be available for public use on reasonable conditions and without unjust discrimination, *see* 49 U.S.C.A. § 47107(a)(1) (West 1997); ATA v. Dept. of Transp., 119 F.3d 38, 39 (D.C. Cir. 1997), and that air carriers making "similar use" of the airport will be subject to substantially comparable charges for air-related facilities and regulations and conditions. *See* 49 U.S.C.A. § 47107(a)(2) (West 1997).

309. *See* City of Santa Monica v. Los Angeles County, 15 Cal. App. 710, 713 (1911). For example, under the Community Redevelopment Law, a city council approves redevelopment plans as an agent of the state. *See* Andrews v. City of San Bernardino, 175 Cal. App. 2d 459, 462 (1959) ("Neither [the City nor the redevelopment agency] is functioning independently of . . . state law and neither may exercise powers not vested or recognized by that law."), *citing* Housing Auth. of City of Los Angeles v. City of Los Angeles, 38 Cal. 2d 853, 862 (1952), *cert. denied*, 344 U.S. 836 (1952); *c.f. e.g., Daniels*, 183 Cal. at 639 (cities control street traffic as agencies of the State, whose people own all public rights-of-way, including city streets).

310. *See, e.g., Adams*, 171 Cal. at 461 (Legislature may delegate authority to city to spend funds for non-municipal purposes); *County of Modoc*, 103 Cal. at 501 (when district attorney acts as public prosecutor county has no control over him); Boys' & Girls' Aid Soc. v. Reis, 71 Cal. 627, 632 (1887) (county must pay expenses for delegated duty to support delinquent children); *Fellom*, 157 Cal. App. 2d at 248 (city acts as administrative arm of the State in pursuing redevelopment in conjunction with State's local housing authority); Ackerman v. Moody, 38 Cal. App. 461 (1918) (Legislature determines extent to which it will confer upon municipal corporation any power to aid in the discharge of obligation which Constitution has imposed upon itself); *c.f.* Friends of the Library of Monterey Park v. City of Monterey Park, 211 Cal. App. 3d 358, 371-72 (1989) ("A local office mandated by state law may not be abolished by local ordinance."), *citing* De Merritt v. Weldon, 154 Cal. 545, 549 (1908).

always resume exercise of functions that it has earlier delegated.[311] In principle, there is nothing to prevent the State from delegating to the counties any or all of its land use regulation powers that preempt conflicting municipal laws.

c. The State may create special districts at will.

California courts give the Legislature free rein over the state's various types of special districts, including: school, irrigation, reclamation, drainage, bridge and highway districts, and redevelopment agencies.[312] Special districts are always agencies of the State.[313] As such, their creation and attributes are wholly in the Legislature's discretion.[314] Therefore, it does not matter that a special district spans more than one county.[315]

In the landmark case In re *Madera Irrigation District*,[316] decided after the advent of charter-based Home Rule, the court left no doubt about the State Legislature's complete discretion *vis à vis* special districts. Specifically, the *Madera* court found that:

> In providing for the welfare of the state and its several parts, the legislature may . . . make special laws relating only to special districts, or it may legislate directly upon local districts, or it may intrust [sic] such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of the county or other municipal organizations for the purposes of legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised within the

311. *See Watson*, 67 Cal. App. at 337; Buckingham v. Commary-Peterson Co., 39 Cal. App. 154 (1918); *County of Los Angeles*, 212 Cal. App. 2d at 164; *Chambers*, 33 Cal. App. at 149-50.

312. *See* PEPPIN IV, *supra* note 96, at 692-94, *citing* County of Los Angeles v. Rockhold, 3 Cal. 2d 192, 209 (1935); Joint Highway. Dist. No. 13 v. Hinman, 220 Cal. 578, 584 (1934).

313. Two types of special districts, drainage districts (not to be confused with irrigation districts) and school districts, are *only* agencies of the State and are not public corporations. *See* People *ex rel.* Chapman v. Sacramento Drainage Dist., 155 Cal. 373, 382 (1909) (drainage districts); People *ex rel.* Williamson v. Rinner, 52 Cal. App. 747, 751 (1921) (school districts).

314. *See Golden Gate Bridge & Highway Dist*, 214 Cal. at 320-21 (State may create bridge and highway district by special act because it is a State purpose, not a local one); *Orosi Pub. Util. Dist.*, 196 Cal. at 50 (State may create utilities district by special act); McDonald v. Richards, 79 Cal. App. 1 (1926) (State may create school districts by special act); *Peterson*, 65 Cal. App. at 677-79 (State may create reclamation districts by special act).

315. *See Williams*, 76 Cal. at 370; *Madera Irrigation Dist.*, 92 Cal. at 308. That said, an exception may or may not exist for Business Improvement Districts that lie solely within a single chartered city.

316. 92 Cal. 296.

> boundaries of said organized districts, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority.[317]

Today, the Legislature can delegate any amount of its own power to special districts as it wishes, except authority to enact penal ordinances.[318] In addition, counties' and cities' police powers are not offended when a special district seeks regional goals.[319] For example, because the State expressly permits it, the San Francisco Bay Conservation and Development Commission ("B.C.D.C.") can preempt local police power affecting the bay, a regional issue.[320]

B. County Government Under Current California Statutory Law

The power to partition California counties or to create new counties resides exclusively in the State Legislature.[321] As discussed above, constitutional provisions limiting the exercise of that power were important at California's Constitutional Convention of 1878. However, amendments during the 1970s moved these into statutory law.

i. Creating County Governments

Article XI, Section 1(a), of the State Constitution requires the Legislature to enact general legislation to form, consolidate, and alter the boundaries of counties.[322] Under the California Government

317. *Id.* at 308.

318. *See Younger I*, 5 Cal. 3d at 496; *accord* Moore v. Salinas Mun. Ct., 170 Cal. App. 2d 548, 556 (1959) ("[S]o long as the Legislature determines the penalty it may leave to the administrative body the actual making of the multiple rules called for by the specific matter regulated."); VAN ALSTYNE, *supra* note 43, at 304-05; *see also, e.g., In re* Sanitary Bd. of East Fruitvale Sanitary Dist., 158 Cal. 453, 457 (1910) (sanitary districts); Galt County Water Dist. v. Evans, 10 Cal. App. 2d 116, 118 (1935) (water districts); Antelope Valley Union High Sch. Dist. v. McClellan, 55 Cal. App. 244, 246 (1921) (school districts); 15 Cal. Att'y Gen. Op. 27, 28 (1950) (police protection districts). However, the Legislature may not delegate authority to levy taxes to a *private* body for any purpose, regional or local. *See Howard Jarvis Taxpayers' Ass'n*, 48 Cal. App. 4th at 1390, 1396.

319. *See Younger I*, 5 Cal. 3d at 496.

320. *See* People *ex rel.* San Francisco B.C.D.C. v. Town of Emeryville, 69 Cal. 2d 533, 549 (1968) (State Legislature may alter grants to cities under tideland trust); Smith, *supra* note 87, at 768.

321. *See* Tulare County v. Kings County, 117 Cal. 195 (1897).

322. *See* CAL. CONST. art. XI, § 1(a). Despite this constitutional imperative, in 1997 the Legislature created by special law a "Los Angeles County Division Commission" to study the fiscal health of Los Angeles County and its capability and efficiency in delivering municipal services, prior to its proposed division. *See* CAL. GOV'T CODE §§ 23345-49 (West Supp. 1998).

Code,[323] county creation begins with a petition from residents of the area at issue,[324] rather than a decision by the Legislature. A certified petition then triggers formation of a governor-appointed committee. If the committee approves the proposed new county, the counties that will cede territory for its formation then refer the issue to their electors.

The Legislature has set some minimum sizes for counties. By statute, no creation can occur if it would reduce any affected county to a population of fewer than 20,000 people or to an area of fewer than 1,200 square miles, or if it would create a new county with a population of fewer than 10,000 people.[325] Further, perhaps merely out of respect for the *status quo*, new counties cannot divide any existing cities.[326]

Similarly, the petition process favors larger secessions to small ones. When the proposed county's population comprises less than five percent of the population of the affected counties, the petition must be signed by at least 25% of registered voters living in the territory of the proposed county, plus at least 10% of registered voters within the balance of the affected counties.[327] Otherwise, the petition need only be signed by at least 25% of registered voters living in the territory of the proposed county.[328] In any case, a copy of the petition must be filed simultaneously with the clerk of each affected county.[329]

Once the petition is certified,[330] the various counties' boards of supervisors turn matters over to the governor,[331] who must appoint five people to a County Formation Review Commission.[332] In a bow to local self-determination, two of the commissioners must reside

323. CAL. GOV'T CODE §§ 23300-98 (West 1988). This legislative scheme has nothing to do with the system devised for the incorporation of cities. *See* CAL. GOV'T CODE § 23310 (West 1988). City incorporation is regulated by the Cortese-Knox Government Reorganization Act of 1985. *See supra* part I.C.ii.

324. *See* CAL. GOV'T CODE § 23320 (West 1988).

325. *See id.* § 23306. The Legislature discourages repeated petitions to form new counties out of existing ones with a small population. No person may file a petition within five years of the date of certification of a prior petition that included any territory also included in the new petition. *See* CAL. GOV'T CODE § 23330.5 (West 1988). However, there is no limit on submitting petitions where the population of any affected county exceeds five million people (*i.e.* Los Angeles County).

326. *See id.* § 23309.

327. *See id.* § 23321(a).

328. *See id.* § 23321(b).

329. *See id.* § 23325.

330. *See id.* § 23328.

331. *See id.* § 23330.5.

332. *See id.* § 23331.

within the territory of the proposed county, two must reside in the territory remaining in the affected county or counties, and one of the five commissioners must be a non-resident of any affected area.[333]

ii. Redrawing County Boundaries

The California Constitution also empowers the State Legislature to pass uniform procedures for county boundary changes. Accordingly, the Legislature has established a two-track system to adjust boundaries between existing counties.[334]

The State has assigned sole discretion over "minor"[335] boundary changes to the affected counties and the inhabitants of the territory proposed for transfer.[336] A county board of supervisors may initiate the process by passing a resolution describing its proposal, and filing it with its counterparts in the other affected county or counties.[337]

Affected residents have a strong influence over even minor boundary changes. If the affected territory is inhabited and more than half of the resident-voters protest in writing, then the board of supervisors must abandon the proposed boundary change.[338] Failing that, and assuming they favor the proposal,[339] the boards of supervisors must adopt the proposed boundary change through ordinances approved by a majority of their members.[340] Nevertheless, if between twenty-five and fifty percent of the resident-voters have filed written protests, the ordinances must be referred to voters in the affected territory who may reject it by majority vote.[341]

333. *See id.*

334. The Legislature regulates the incorporation, reconfiguration or dissolution of cities and special districts under the Cortese-Knox Government Reorganization Act of 1985. *See supra* part I.C.ii.

335. Statute defines a minor alteration as one moving a boundary fewer than five miles from its original location, and reducing the area and population of any affected county by less than five percent. *See* CAL. GOV'T CODE § 23202 (West 1988).

336. *See id.* §§ 23200-20.

337. *See id.* §§ 23203-04. Alternatively, the proposal may be initiated by a petition filed with the board of supervisors of any affected county, and signed by at least 25% of the affected territory's resident-voters or by 25% its property owners who also own at least 25% of the assessed value of real estate in the territory. *See id.* § 23205. The boards of supervisors for the affected counties then must hold a noticed hearing. *See id.* § 23206-08.

338. *See id.* § 23209(a). Where uninhabited territory is at issue, more than 50% of the property owners who own more than 50% of the value of the land and improvements in the affected territory can exercise the same veto power. *See id.* §§ 23209(b).

339. *See id.* § 23209(c).

340. *See id.* § 23210. These ordinances may include any terms and conditions to which the boundary change is subject, including a division of any county debt or property. *See id.* § 23210(b).

341. *See id.* § 23210(c)-(d).

A major boundary change requires a lengthier procedure, involving a governor-appointed commission.[342] The process may be initiated by voter petition, or by a resolution of either the county's board of supervisors or of a city council within the county proposed to cede territory.[343] A petition requires the signature of at least 25% of the registered voters within each county as of the last gubernatorial election.[344]

Assuming a sufficient petition, or alternatively, a suitable resolution, the governor must create a five-member County Boundary Review Commission to examine the proposed major change.[345] Two commissioners must reside in each of the two affected counties, and the fifth commissioner may not live in either county.[346] After gathering information through a public hearing,[347] the Commission must determine an equitable distribution of the affected counties' indebtedness, as well as the foreseeable economic viability and allocation of functions for each.[348]

The Commission then transmits its determinations in the form of a resolution to both counties' boards of supervisors,[349] who then must disapprove the proposed boundary change, or accept the Commission's determinations as both final and binding.[350] Finally, there is an election in the territory proposed for transfer,[351] and if at least 50% of residents approve, the boundary change occurs.[352]

iii. Consolidating Counties

The procedure to consolidate two or more counties is almost identical to the one for major boundary changes. The process begins

342. *See id.* §§ 23230-23296.

343. *See id.* § 23233.

344. *See id.* § 23235. All of the signatures must be collected within a six-month period. *See id.* § 23240. If the territory to be transferred is uninhabited, owners of at least one-fourth of the land, measured by both area and assessed value, must sign the petition. *See id.* § 23236. Even with a sufficient petition, if a majority of such owners subsequently protest the boundary change, no change may be made involving the same territory for the next year. *See id.* § 23255.

345. *See id.* § 23248.

346. *See id.*

347. *See id.* § 23252.

348. *See id.* § 23249. To determine fiscal impact, the commission must consider the cost of providing services in each county, the projected revenues to each county, and the effect of any projected reduction in revenue available to each county. *See id.* § 23250.

349. *See id.* § 23264.

350. *See id.* §§ 23264-65.

351. *See id.* § 23267.

352. *See id.* § 23281.

with either a voter petition or a resolution of each counties' board of supervisors.[353] Again, the petition must be signed by at least 25% of the registered voters within each county as of the last gubernatorial election.[354]

Likewise, upon receipt of a sufficient petition or resolution, the governor must create a County Consolidation Commission,[355] which must hold a public hearing to receive relevant information,[356] and then make a series of final and binding determinations of the terms and conditions for the proposed consolidation.[357] Through separate elections, a majority of voters in each affected county must approve the consolidation.[358]

Because of all these procedural requirements, it is more difficult to effect a major boundary change or consolidate counties than it is to amend the State Constitution. Voters may approve the latter by a simple majority,[359] and a petition to put such initiatives on the statewide ballot requires signatures by only eight percent of the number of votes cast in the last gubernatorial election.[360] Suffice it to say that no major boundary changes have occurred since Imperial County split off from San Diego County in 1907.

Neither the redrawing of county lines nor the wholesale consolidation of counties appears to be a fruitful way to achieve regional governance. As a matter of practical politics, either would likely prove as difficult as persuading cities and voters to cede their autonomy to new regional entities.

C. California Intergovernmental Relations

As discussed above, the State Constitution allows counties to make and enforce within their boundaries all ordinances and regulations not in conflict with general laws.[361] A county's power to control

353. *See id.* § 23510.

354. *See id.* § 23511. As with petitions for major boundary changes, all of the signatures must be collected within a six-month period. *See id.* § 23514.

355. *See id.* § 23530.

356. *See id.* § 23531.

357. *See id.* §§ 23535, 23538. These determinations include the location of the proposed consolidated county's county seat. *See id.* § 23535(f).

358. *See id.* § 23567.

359. *See id.* art. II, § 10(a). The Legislature may also amend the Constitution but only on the affirmative vote of two-thirds of each house. *See id.* art. XVIII, § 1. A constitutional convention is yet another possibility. *See id.*

360. *See* CAL. CONST. art. II, § 8(b).

361. *See supra* note 258.

land uses lies within this inherent "police power."[362] However, neither the police power nor even a chartered city's exclusive control over its municipal affairs permits regulating the State itself.[363]

This is so because local governments are necessarily subordinate to the State's sovereign power. By virtue of its "sovereign immunity," the State is exempt from all local laws, even those of a chartered city regulating its municipal affairs. Even private agents of the State enjoy this immunity if they are acting toward a public purpose.

Five harder questions are: (1) May a county or a city regulate a special district, (2) May a county regulate the internal activities of a city or of another county, (3) May a city regulate a county's external activities, (4) May a county regulate the external activities of a city or county, and (5) May a city regulate another city's external activities? Because of comity between California localities, courts have encountered these questions only rarely. When called upon to answer, the California courts have muddled the law even when they reach the right result.

i. Sovereign Immunity

The Sovereign Immunity Doctrine is a discredited principle that once immunized governmental activities but not proprietary functions from tort liability.[364] The problem was in the details because the dis-

362. *See DeVita*, 9 Cal. 4th at 782 ("'Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7.' . . . [A] city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state."); *accord Hurst*, 207 Cal. at 138; Foster v. City Council of City of Berkeley, 201 Cal. 769 (1927); *Fourcade*, 196 Cal. 655; *Miller*, 195 Cal. 477; Taschner v. City Council of City of Laguna Beach, 31 Cal. App. 3d 48 (1973), *disapproved on other grounds in Associated Home Builders*, 18 Cal. 3d at 596 n.14; Scrutton v. Sacramento County, 275 Cal. App. 2d 412 (1969); People v. Johnson, 129 Cal. App. 2d 1 (1954); City of Stockton v. Frisbie & Latta, 93 Cal. App. 277 (1928); A. C. Blumenthal & Co. v. Cryer, 71 Cal. App. 668 (1925); *see also* Santa Monica Pines Ltd. v. Rent Control Bd. of City of Santa Monica, 35 Cal. 3d 858 (1984) (city's police power gives it independent authority to regulate subdivisions and it was not preempted by Subdivision Map Act).

But c.f. Brougher v. Bd. of Pub. Works of City and County of San Francisco, 205 Cal. 426, 439 (1928) (method of adopting zoning ordinances is a "municipal affair").

363. There seems to be a special exception to permit localities to abate nuisances created by the State. *See* Bloom v. City and County of San Francisco, 64 Cal. 503, 504 (1884). This is perhaps because, by definition, a nuisance impairs the property rights of citizens that the State must respect.

364. *See, e.g.*, City of Pasadena v. Railroad Comm'n, 183 Cal. 526 (1920), *overruled in part on other grounds by Los Angeles Metro. Transit Auth.*, 59 Cal. 2d at 869; *accord* Chafor v. City of Long Beach, 174 Cal. 478, 486-87 (1917); Davoust v. City of Alameda, 149 Cal. 69 (1906); Town of Ukiah v. Ukiah Water & Improvement Co., 142 Cal. 173, 179 (1904); Chope v. City of Eureka, 78 Cal. 588, 590 (1889); Holland v. City of San Francisco, 7 Cal.

tinction between governmental and proprietary activities was not sharp and clear.[365] For over a century, California courts struggled to distinguish the two.[366] Sometimes, the court looked to historical functions; other times, it looked to see if there was a profit motive.[367]

For purposes of tort law, the State Supreme Court swept the doctrine away in 1961, holding in *Muskopf v. Corning Hospital District*[368] that "it must be discarded as mistaken and unjust."[369] The Legislature has since partially waived the tort immunity of the State and its officers through the California Tort Claims Act.[370] The doctrine, however, still matters in intergovernmental relations.

Sovereign immunity also plays a role in federal constitutional law. The United States Supreme Court interprets the Eleventh Amendment of the U.S. Constitution to mean that each state is sovereign, and that it is inherent in the nature of sovereignty not to be amenable to suit by an individual without the sovereign's consent.[371] Thus, even when Congress has complete lawmaking power over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against non-consenting states.[372] Furthermore, Congress may abrogate states' sovereign immunity only by unequivo-

361, 376 (1857), *overruled in part on other grounds*, McCracken v. City of San Francisco, 16 Cal. 591, 622 (1860); Touchard v. Touchard, 5 Cal. 306, 307 (1855); *see also* Brown v. Bd. of Educ., 103 Cal. 531, 534-35 (1894) (municipal corporation liable on common counts for contract claims).

365. *See Barrett*, 161 Cal. App. 2d at 42.

366. Proprietary uses fall into two classes: those engaged in by a municipal corporation which are for public purposes, such as operation of public utilities, and other proprietary activities which are not for public purposes. *See* Marin City Water Power Co. v. Town of Sausalito, 49 Cal. App. 78, 83 (1920); Board of Trustees of Cal. State Univ. & Colleges v. City of Los Angeles, 49 Cal. App. 3d, 49-50 (1975); S.F. City Att'y Op. No. 3963, at 3 (May 21, 1947).

367. *See, e.g.*, Manning v. City of Pasadena, 58 Cal. App. 666, 669 (1922) (garbage disposal a traditional governmental function), *review denied*, Oct. 2, 1922; Foxen v. City of Santa Barbara, 166 Cal. 77, 79 (1913) (water sold for profit, so city water works held in proprietary capacity); *see also* 17 Cal. Att'y Gen. Op. 125, 127 (1951) (because city operates oil wells as proprietary function, it is subject to same charges imposed on private oil producers).

368. 55 Cal. 2d 211 (1961) (5-2 decision), *reh'g denied*, Feb. 21, 1961 (two justices dissenting).

369. *Id.* at 213.

370. CAL. GOV'T CODE §§ 810-997 (West 1995); *see also* CAL. CONST. art. III, § 5 ("Suits may be brought against the State in such manner and in such courts as shall be directed by law.").

371. *See* Alden v. Maine, ___ U.S. ___, ___, 119 S.Ct. 2240, 2246 (1999); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 54 (1996).

372. *See Seminole Tribe of Florida*, 517 U.S. at 72.

cally expressing its intent to do so,[373] and only under Section Five of the Fourteenth Amendment.[374]

The Supreme Court's Eleventh Amendment jurisprudence is controversial. Some scholars believe that the Court erects sovereign immunity as an obstacle only if and when it feels our federalism is unfairly endangered.[375] Indeed, the Court seems hardly to have stumbled where it felt it was important for "states' rights" to give way, as in racial desegregation of schools.[376] Still, the doctrine is as important today as it ever was.[377]

a. Sovereign immunity's most logical basis is as a rule of statutory construction.

Apart from policy, there is a purely logical basis for sovereign immunity. Justice Oliver Wendell Holmes, Jr. was a strong proponent for this view stating that:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends. [Citations omitted].
>
> As the ground is thus logical and practical, the doctrine is not confined to powers that are sovereign in the full sense of juridical theory, but naturally extended to those that, in actual administration, originate and change at their will the law of contract and property, from which persons within the jurisdiction derive their rights.[378]

Holmes' rule of construction traces its pedigree back to English and early American jurisprudence. Sir William Blackstone included it in his commentaries,[379] and New York State's Chancellor James Kent

373. *See id.* at 55.

374. *See id.* at 59.

375. *See* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 156 (1972).

376. *See id., citing, e.g.*, Griffin v. Sch. Bd. of Prince Edward County, 377 U.S. 218, 228 (1964) and Brief of Respondent in *Griffin* (1963).

377. The Supreme Court recently expanded the effect of the Eleventh Amendment by holding in *Alden v. Maine*, that Congress lacks the power under Article I of the U.S. Constitution to subject non-consenting States to private suits even in their own courts. *See Alden*, supra note 367.

378. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (dictum).

379. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, VOL. I, 261(Philadelphia, Robert Bell, Printer, 1770-71), *quoted in* Balthasar v. Pac. Elec. Ry. Co., 187 Cal. 302, 305 (1921). Blackstone assumed that England's sovereign (the King) would do justice whenever a valid claim arose. *See* JACOBS, *supra* note 371, at 8.

used a similar formulation.[380] Sitting for a First Circuit case, Justice Joseph Story firmly established the rule in American law, emphasizing that it was not grounded in any prerogative of the government, but in a favoritism to the public interest, and a need to further the intent of the legislature.[381]

According to Professor Clyde Jacobs, the Holmesian view assumes its own conclusion, and is objectionable for postulating a conception of sovereignty that is "even more authoritarian than the theory of kingship upon which the supremacy of the English ruler was based."[382] Jacobs contends that American constitutionalism assumes that the people in their constituent role are their own lawgivers, and that in this role the people do not have an exemption from liability or from amenability to suit.[383] Also, he writes that precisely because of the people's ultimate sovereignty, the government cannot invoke immunity against them.[384]

Jacobs cites no authority for the proposition that the people in their "constituent role" lack sovereign immunity, and thus assumes *his* own conclusion. Furthermore, Jacobs contradicts himself by conceding the logic that there can be no legal right against the lawmaker unless the lawmaker has created it.[385] The people of California created their government.[386] It follows that the State Legislature's power represents the people's independent sovereignty, unlimited except by the State Constitution.[387] Therefore, the people must say if they want to be held liable by individual citizens.

At the root of Jacobs' view is that sovereign immunity is "morally indefensible."[388] This may be true, but it does not respond to Holmes'

380. *See* Kent's Commentaries, at 460, *quoted in Balthasar*, 187 Cal. at 305.

381. [T]hough this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments . . . .

But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention . . . . In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to [citizens] applies very different, and often contrary force to the government itself.

United States v. Hoar, 26 F. 329, 330 (C.C.D. Mass. 1821).

382. JACOBS, *supra* note 371, at 155.

383. *See id.*

384. *See id.*

385. *See id.*

386. *See Lynch*, 51 Cal. at 28.

387. *See* Beals v. Bd. of Supervisors of Amador County, 35 Cal. 624, 630 (1868).

388. California Supreme Court Chief Justice Traynor shared this view. *See Muskopf*, 55 Cal. 3d at 159. Of course, Traynor expressed his view only in regard to the government's tort liability, and at a time when the State probably enjoyed its greatest prosperity. With

syllogism. Perhaps there exists better criticism of the Holmesian view as it applies to the states' internal affairs, but it has yet to be found.[389]

b. California courts apply sovereign immunity as a rule of construction.

Whatever its merits, the Holmesian view is law in California. State courts hold that sovereign immunity derives from a fundamental rule of statutory construction that a law may not be construed to bind the State or its agencies unless the law mentions the State or its agencies expressly or by necessary implication.[390]

In another formulation, the doctrine will not allow laws to trench upon the State's sovereign rights, injuriously affect its capacity to perform its functions, or establish a right of action against it.[391] However, where the sovereign power is not impaired, the reason underlying this formulation ceases to exist and the courts may impute legislative intent to apply the statute to governmental bodies.[392]

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today's limitations on public revenues, even the morality of unlimited government tort liability may have changed.

389. I agree with Justice John Paul Stevens that Justice Holmes' explanation does not speak to the question whether Congress should be able to authorize a federal court to provide a private remedy for a State's violation of *federal* law. *See Seminole Tribe*, 517 U.S. at 44, 116 S.Ct. at 1144 (Stevens, J., dissenting). On the other hand, in his dissent to *Alden*, joined by Stevens and three other justices, Justice Souter had to concede that Holmes' theory is "logically impeccable." *See Alden*, ___ U.S. at ___, 119 S.Ct. at 2287. In any case, debate over the meaning of the Eleventh Amendment is beyond the scope of this article.

390. *See Hall*, 47 Cal. 2d at 183; In re Means, 14 Cal. 2d 254, 258 (1939); *accord Butterworth*, 12 Cal. 2d at 150; *Estate of Miller*, 5 Cal. 2d at 597; Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 98 (1934); City of Inglewood v. County of Los Angeles, 207 Cal. 697, 707 (1929); *C. J. Kubach Co.*, 199 Cal. 215; *Chenu*, 188 Cal. at 736; *Balthasar*, 187 Cal. at 305; *County of Solano*, 54 Cal. App. 4th at 1167; Laidlaw Waste Sys., Inc. v. Cities Servs., Inc., 43 Cal. App. 4th 630, 635 (1996); Del Norte Disposal, Inc. v. Dept. of Corrections, 26 Cal. App. 4th 1009, 1012-13 (1994), *review denied*, Oct. 27, 1994; Churchill v. Parnell, 170 Cal. App. 3d 1094, 1097-98 (1985); Siegel v. City of Oakland, 79 Cal. App. 3d 351, 357 (1978); City of Orange v. Valenti, 37 Cal. App. 3d 240, 245 (1974); Town of Atherton v. Super. Ct., 159 Cal. App. 2d 417, 428 (1958).

391. *See* Mayrhofer v. Bd. of Educ., 89 Cal. 110, 112 (1891).

392. Regents of the Univ. of Cal. v. Super. Ct., 17 Cal. 3d 533, 536 (1976); *accord* City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 276-77 (1975); *In re* Bevilacqua's Estate, 31 Cal. 2d 580, 585 (1948); Community Mem'l Hosp. v. County of Ventura, 50 Cal. App. 4th 199, 210 (1996), *review denied*, Nov. 13, 1996); *see also* Hoyt v. Bd. of Civil Serv. Comm'rs of City of Los Angeles, 21 Cal. 2d 399, 402 (1942) (where effect would impair sovereign powers, the word "person" in a statute does not mean the State or its political subdivisions without an express indication of legislative intent); *Balthasar*, 187 Cal. at 308 (same); Berton v. All Persons, 176 Cal. 610, 617 (1917); Philbrick v. State Personnel Bd., 53 Cal. App. 2d 222, 228 (1942) (same); *see, e.g.* People v. Centr-O-Mart, 34 Cal. 2d 702, 704 (1950) (stated legislative purpose to "safeguard the public" construed to mean Unfair Practices Act applies to government agencies).

California courts have long applied either or both formulations of the rule with a liberal eye. For example, in *Berton v. All Persons*,[393] the court held that the general language of an act did not apply to a city even though the State Legislature had made one of its provisions "binding on the whole world."[394] As the court explained:

> Law is a rule of conduct dictated by the superior, the state, for the conduct and control of its people. *It is only by its own grace that the state ever becomes subject to the operation of its own laws*, and while in later governmental development the state frequently makes declaration that it will submit its own rights to determination in its own or other courts, yet, *as such declarations are always the nature of impairments of the sovereign power, this submission of the state is never inferred in favor of the private litigant, but must be found either actually expressed in an act or by fair intendment and interpretation belong in the act.*.[395]

In the area of land use controls, this rule of statutory construction still applies, modified only by the relatively recent applicability of voter initiatives and referenda.[396] The State and its agencies are presumptively immune from all local land use regulations, even those of a chartered city regulating its municipal affairs.[397] Such immunity even extends to cover private lessees from the State, as long as they are acting toward a state purpose.[398] To remove the presumption, the Legislature must explicitly waive its immunity.[399] Neither a private

393. 176 Cal. 610 (1917).

394. *See Balthasar*, 187 Cal. at 307.

395. *Berton*, 176 Cal. at 617, *quoted in Balthasar*, 187 Cal. at 307.

396. *C.f. City of Woodlake*, 230 Cal. App. 3d at 1065 (voters possess independent power to waive sovereign immunity).

397. *See Hall*, 47 Cal. 2d at 183; Regents of the Univ. of Cal. v. City of Santa Monica, 77 Cal. App. 3d 130, 136-37 (1978).

398. *See Means*, 14 Cal. 2d at 260 (journeyman plumbers need no certificate of registration when working on state fairgrounds); 57 Cal. Att'y Gen. Op. 124, 126 (1974) (county's immunity for property located within city's boundaries extends to public purposes by private lessee); 56 Cal. Att'y Gen. Op. 210, 216 (1973) (district agricultural association should make efforts, in the interests of city-state relations, to generally respect the city building and zoning scheme, but neither association nor its lessee subject to city building and zoning ordinances); 54 Cal. Att'y Gen. Op. 158, 161 (1971) (chartered city may not regulate oil and gas lessee of State-owned tidelands and submerged lands); 36 Cal. Att'y Gen. Op. 179, 184 (1960) (if the state is immune, its lessees are immune if the incidence of the regulation would be borne by the state); 31 Cal. Att'y Gen. Op. 46, 51 (1958) (lessee at city-owned arena immune from business taxes because they would interfere with State-approved lease).

But see 61 Cal. Att'y Gen. Op. 599, 560 (1978) (independent contractor to the State may not avoid paying local business tax); S.F. City Att'y Op. No. 634 (Dec. 5, 1932) (lessee of property owned by Municipal Railway for drugstore must pay city business taxes).

399. *See Hall*, 47 Cal. 2d at 183 (school district immune from city land use controls); *Valenti*, 37 Cal. App. 3d at 244-45; *County of Los Angeles*, 212 Cal. App. 2d at 165.

lessee of state land, nor an agency of the State may waive the immunity.[400] Only the Legislature may do so.

Finally, although localities are not considered sovereign, they still can benefit from the sovereign immunity doctrine as a rule of statutory construction. Thus, the city attorney for the City and County of San Francisco has opined that an incinerator franchised out by the city could be sited regardless of the city's zoning code,[401] and that the city could site a firehouse in a residential district without rezoning the neighborhood for that kind of use.[402]

c. The State's sovereign immunity trumps Home Rule.

By providing counties and cities with the police power within their respective territories, Article XI, Section 11, of the California Constitution does not abrogate the State's sovereign immunity.[403] There still remains, however, the Constitution's provision for charter-based Home Rule. If a chartered city controls its own municipal affairs, and if one of that city's ordinances affecting a municipal affair expressly identifies the State as part of the regulated class, should not the State have to comply with the ordinance? No.

In 1956, the California Supreme Court unanimously held in *Hall v. City of Taft*,[404] that because a school district is an agency of the State[405] it is necessarily immune from local land use controls.[406] The *Hall* court's theory rested on a conception of the city, chartered or not, as a creature of the State:

> It is competent for the state to retain to itself some part of the government even within the municipality; which it will exercise directly, or through the medium of other selected and more suitable instrumentalities. *How can the city ever have a superior authority to the state over the latter's own property; or in its control and management? From the nature of things it cannot have.*[407]

The *Hall* court took this quotation from a Kentucky case. The Commonwealth of Kentucky's Constitution differed significantly from

400. *See Valenti*, 37 Cal. App. 3d at 245.
401. *See* S.F. City Att'y Op. No. 490 (Oct. 2, 1931).
402. *See* S.F. City Att'y Op. No. 7 (Nov. 30, 1949).
403. *See Hall*, 47 Cal. 2d at 183.
404. 47 Cal. 2d 177 (1956) (unanimous).
405. *See Compton Junior College Dist.*, 77 Cal. App. 2d at 728 (school district is not a municipal corporation), *review denied*, Mar. 20, 1947; *Rinner*, 52 Cal. App. at 751 (same).
406. *See also Town of Atherton*, 159 Cal. App. 2d 417 (following Hall v. City of Taft, 47 Cal. 2d 177).
407. *See Hall*, 47 Cal. 2d at 183-84, *quoting* Kentucky Inst. for Educ. of Blind v. City of Louisville, 123 Ky. 767, 97 S.W. 402 (Ky. Ct. App. 1906).

California's, notably in regard to chartered cities, whose Home Rule powers had been recognized in the California Constitution sixty years before *Hall* came down. One could reason that the California Legislature's ability to preempt a city's police power under the State Constitution, in effect, reserves immunity for the State from city ordinances. On the other hand, because the State Constitution, not the Legislature, grants chartered cities exclusive power over their municipal affairs, it is hard to see how the State can "retain" immunity there.

One way around this difficulty is to assume that municipal affairs can never involve regulating the State. Recall that California courts define "municipal affairs" to mean everything that is not a "statewide concern."[408] Here, geography is not determinative, even in the land use context, because "[u]nder certain circumstances, an act relating to property within a city may be of such general concern that local regulation concerning municipal affairs is inapplicable."[409]

Analogizing to federal-state relations helps clarify the issue. Under the Supremacy Clause of United States Constitution, an instrumentality of the federal government is generally immune from regulation by state or local authorities.[410] To remove that immunity, Congress must affirmatively subject federal installations to local regulation.[411] For example, the Office of the California Attorney General has construed the Postal Reorganization Act[412] to immunize the Postal Service from local zoning regulations that affect the construction of a post office.[413]

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408. *Bradley*, 4 Cal. 4th at 399-400.

409. *Means*, 14 Cal. 2d at 259.

410. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land . . . . "); Hancock v. Train, 426 U.S. 167, 178 (1976); M'Culloch v. State of Maryland, 17 U.S. 316, 427 (1819). In *M'Culloch*, Chief Justice Marshall reasoned, in part, that allowing a state to tax federal instrumentalities unfairly denied representation to U.S. citizens living in other states. *See id.* at 435-36.

411. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 180 (1988); *accord Hancock*, 426 U.S. at 179 (no clear declaration by Congress requiring federal installations to obtain state air pollution permits); Mayo v. United States, 319 U.S. 441, 447-48 (1943) (Congress has not subjected itself to payment of state inspection fees), *reh'g denied* 320 U.S. 810 (1943).

412. 39 U.S.C.A. §§ 101-6440 (West 1997).

413. *See* 68 Cal. Att'y Gen. Op. 310 (1985). The A.G.'s opinion rests on solid authority. *See id.* at 311-12 *citing* Middletown TP v. N/E Reg. Off., U.S. Postal Svc., 601 F. Supp. 125, 127 (D. N.J. 1985) (Postmaster General's authority to erect post office on proposed site may not be restricted by local ordinance); Stewart v. United States Postal Serv., 508 F. Supp. 112, 116 (N.D. Cal. 1980) (Postal Service need not comply with local zoning ordinances that hamper its functions); Andrews v. Srogi, 431 N.Y.S.2d 224, 225 (1980) (same); Thanet Corp. v. Bd. of Adjustment of Township of Princeton, 104 N.J. Super. 180, 249 A.2d 31 (N.J. Super. Law Div. 1969) (same), *aff'd* 108 N.J. Super. 65, 260 A.2d 1 (N.J. Super.

All this goes to show that because no city is sovereign,[414] it would be incongruous if a city could regulate a sovereign State that cannot itself regulate another sovereign. As for chartered counties, their autonomy is limited to electoral and administrative matters.[415] These matters are unlikely even to involve direct regulation of the State. Additionally, because counties are subdivisions of the State,[416] it is easier to imagine that the State could "retain" immunity from county ordinances in all cases. Indeed, a California court of appeals held that the State's sovereign immunity trumps Home Rule.[417]

d. Under California law, counties are sovereign but cities are not.

Counties are subdivisions of the State.[418] The principal purpose in establishing counties was to make effectual the State's political organization and civil administration requiring local direction, supervi-

App. Div. 1969), *cert. denied* 55 N.J. 360, 262 A.2d 207 (N.J. 1970); Black v. City of Berea, 137 Ohio St. 611, 32 N.E.2d 1, 7 (Ohio 1941) (location of mailbox on post road is matter for postal authorities and city can take no action on it).

Federal immunity from local regulation derives separately from the Property Clause, which provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. This language essentially grants Congress unlimited power over its land. *See* California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). The Property Clause does not forbid other governments from regulating federal lands, *see id.* at 580, 59, but exempts federal lands from such regulation where contrary federal law exists. *See id.* at 580-81, 593.

On the other hand, the Intergovernmental Cooperation Act ("I.C.A.") requires federal agencies, such as the Postal Service, "[t]o the extent possible," to consider all local viewpoints in planning its development programs and projects. 31 U.S.C. § 6506(c); Exec. Order No. 12372, 47 Fed.Reg. 30959, 3 C.F.R. § 197 (1982) ('For those cases where the concerns [of elected State and local officials] cannot be accommodated, Federal officials shall explain the bases for their decision in a timely manner.").

Finally, the National Environmental Policy Act ("NEPA"), 42 U.S.C.A. § 4321-95 (West 1994), applies to all federal projects. Pursuant to NEPA, federal agencies operating in California must take the necessary "hard look" at environmental consequences before approving any major action. *See* LaFlamme v. F.E.R.C., 852 F.2d 389, 398 (9th Cir. 1988), *citing* Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).

414. *See supra* part III.A.iii.b.

415. *See supra* part III.A.i.a.

416. *See supra* note 260.

417. "Since the question is one of immunity. . . not preemption, it makes no difference whether the local government is a charter city as opposed to some other form of local government. The sovereign immunity of a state agency from local regulation does not depend upon the source of the local government entity's [power] to make regulations, it depends upon whether consent to regulations has been expressly stated by the Legislature or in the state constitution." *Laidlaw*, 43 Cal. App. 4th at 638-39.

418. *See supra* note 260.

sion, and control.[419] County powers and functions therefore have direct and exclusive reference to general state policy.[420] In California, as agents of the state performing state-related functions, counties exercise the State's delegated sovereign power.

The United States Supreme Court has held that sovereign immunity, as recognized in the Eleventh Amendment, forbids a citizen from asserting a claim under 42 U.S.C. Section 1983 ("Section 1983") against any state.[421] In contrast, the U.S. Supreme Court does not think it possible for a county to be sovereign for purposes of the Eleventh Amendment.[422] Therefore, the High Court has held that Section 1983,[423] which bars deprivations of one's civil rights by "any person," applies to local governments.[424]

That is federal law. In contrast, the California Supreme Court has held that a county enjoys sovereign immunity because it is "a portion of the State Government."[425] Furthermore, unlike a city, a

419. *See* Dineen v. City and County of San Francisco, 38 Cal. App. 2d 486, 490 (1940), *review denied,* June 13, 1940.

420. *See* Central Pacific Ry. Co. v. Costa, 84 Cal. App. 577 (1927); *see also Riley*, 6 Cal. 2d at 625-27 (with certain exceptions, the powers and functions of counties have direct and exclusive reference to general policy of the State and are but a branch of general administration of that policy).

But see People v. Super. Ct., 29 Cal. 2d 754, 762-63 (1947) (counties act in proprietary capacity, not just governmental capacity).

421. *See* Arizonans v. Arizona, 520 U.S. 43, 48, 117 S.Ct. 1055, 1059 (1997) (§ 1983 actions do not lie against a State), *citing* Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 (1989) (neither a State nor its officials acting in official capacities are "persons" under § 1983); *see also Seminole Tribe of Fla.,* 116 S.Ct. at 1125 (Congress may abrogate the 11th Amendment solely through the Fourteenth Amendment where it clearly expresses its intent to do so through statute); Quern v. Jordan, 440 U.S. 332, 338-41 (1979) (Ku Klux Klan Act of 1871 did not abrogate States' sovereign immunity under 11th Amendment).

422. *See* Lincoln County v. Luning, 133 U.S. 529, 530 (1890) (county may not invoke Eleventh Amendment because the State is not the "real" defendant); *see also* Moor v. County of Alameda, 411 U.S. 693, 718-21 (1973) (California counties have the indicia of independence relative to the State of California so they are "citizens" for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a)); Hopkins v. Clemson Agric. College of S. Carolina College, 221 U.S. 636, 646 (1911) (imputed liability for local officials wrongs); *Ex parte* Taylor, 149 U.S. 164 (1893); Graham v. Folsom, 200 U.S. 248 (1906).

But c.f. Wheeler, 435 U.S. at 320 ("*cities* are not sovereign entities.") (emphasis added).

423. 42 U.S.C. § 1983 (West 1994).

424. *See* Monell v. Dept. of Soc. Servs., 436 U.S. 658, 690 (1978).

425. *See Sharp*, 34 Cal. at 290, *citing Hunsacker*, 5 Cal. at 290 (creditor of county has no remedy by virtue of county's derivative sovereignty); *see also Baldwin*, 31 Cal. App. 4th at 175 (statutory references to "the State" may include counties).

But see LAFCO of Sacramento County, 3 Cal. 4th at 914 ("In our federal system the states are sovereign but cities and counties are not; in California as elsewhere they are mere creatures of the state and exist only at the state's sufferance.").

county is not a corporation[426] and so is not a person in any sense.[427] A county always performs the State's business, even when managing its property.[428] Therefore, California courts hold that a county may invoke immunity from city ordinances affecting its property,[429] even when leased to a private party that does not itself benefit from the immunity,[430] and even when a chartered city is regulating a municipal affair.[431]

ii. The Intergovernmental Immunity Fiasco

Under California's Sovereign Immunity Doctrine, courts may not by implication immunize mere cities, which are not sovereign, from the valid regulations of counties, which are. In other words, county regulation applying within that county's own territorial limits presumptively should preempt a city's activities outside of that city's territorial jurisdiction. Unfortunately, that is not the law.

a. By statute, the State has waived sovereign immunity for all its special districts, except certain transit agencies.

The *Hall* decision of 1956,[432] which had immunized school districts from local land use controls, was politically unpopular. Soon after, the California Assembly's Interim Committee on Municipal and County Government conducted a study of the problem, including analysis by the Legislative Counsel and testimony from local officials.

Published as "Problems of Local Government Resulting from *Hall v. City of Taft* Case Decision," this study had two stated purposes: first, to inquire into the problems arising out of regulatory and

426. *See Vagim*, 230 Cal. App. 2d at 290 ("Speaking generally, a county is a legal subdivision of the state. It is neither a private nor a public corporation, nor strictly speaking, a corporation of any kind.").

427. *Hunsacker*, 5 Cal. at 290 (holding that county cannot be sued).

428. *See Chambers*, 33 Cal. App. at 149 (counties' governmental functions are performed on behalf of the State); *Guidi*, 41 Cal. 2d 623 (counties do not always act in governmental capacity but sometimes in proprietary capacity); *County of Marin*, 53 Cal. 2d at 638-39 (because a county is merely a subdivision of the State, a county holds property in trust for the people of the State); San Miguel Consol. Fire Protection Dist., 25 Cal. App. 4th 134, 143 (1994) (same), *rev. denied*, Aug. 25, 1994; *see also Reclamation Dist. No. 1500*, 171 Cal. at 680 (when State damages or takes its own property held by a county, it is not required to provide compensation); *Vagim*, 230 Cal. App. 2d at 290 (same).

429. *See, e.g.*, Simpson v. Hite, 36 Cal. 2d 125, 130-31 (1950); County of Santa Barbara v. City of Santa Barbara, 59 Cal. App. 3d 364, 371 (1976); *Valenti*, 37 Cal. App. 3d at 244; *Vagim*, 230 Cal. App. 2d at 291-92, 293; *County of Los Angeles*, 212 Cal. App. 2d at 165.

430. *See, e.g.*, Akins v. County of Sonoma, 67 Cal. 3d 185, 194 (1967).

431. *See, e.g., County of Los Angeles*, 212 Cal. App. 2d at 165.

432. *See supra* part II.C.i.c.

inspection powers pertaining to school construction, and second, to inquire into "the overall problems of a possible complete immunity from local regulations by those governmental agencies which might be termed 'local agencies of the state.' [citation omitted]"[433]

Here, the Interim Committee cited to a letter from the Office of the Legislative Counsel, which it also included as Appendix A to its report. In that letter, the Legislative Counsel had written that under *Hall*, most, but not all, government bodies in California could be interpreted as a "local agency of the State."[434]

The Legislative Counsel[435] went on to explain correctly that cities are agencies of the State only when performing particular state purposes, such as executing housing laws.[436] Otherwise, cities are municipal corporations, incorporated by their inhabitants for local government purposes.[437] That is, generally cities are *not* agencies of the State, and, therefore, fall outside both of the Interim Committee's stated purposes for its inquiry.[438] Given the prominence of the Legislative Counsel's letter in the Interim Committee's report, one can assume that the Interim Committee made its recommendations with reference to it.[439]

The Interim Committee's report also included testimony from several city attorneys alarmed by the implications of extending the *Hall* decision beyond school districts. All the city attorneys who spoke called on the Legislature to submit at least some of its agencies to local land use controls.[440] The representative for the County Su-

433. Cal. Assembly Interim Comm. on Mun. & County Gov't, *Problems of Local Government Resulting from* Hall v. City of Taft *Case Decision*, 6 ASSEM. INT. RPTS. 1957-1959 No. 8, 1, 7, *as quoted in* 56 Cal. Att'y Gen. Op. 210, 213 (1973) (emphasis added).

434. [A]s a general proposition, counties and all of the various types of districts, agencies, and authorities, exercising governmental functions within limited territorial boundaries and created or authorized by state law are agencies of the State for the local operation of some particular function. *For certain purposes cities may fall within such classification, although as a general proposition they do not. See id.*, Appx. A, at 20 (Letter dated Sept. 24, 1958, from Legislative Counsel Ralph N. Kleps to Hon. Clark L. Bradley).

435. The Legislative Counsel, Ralph N. Kleps, signed the letter himself. *See id.*

436. *See id.*, Appx. A, at 20-21, *citing Housing Auth. of City of Los Angeles*, 38 Cal. 2d at 861-62.

437. *See id.*, Appx. A, at 21, *citing* Griffin v. County of Colusa, 44 Cal. App. 2d 915, 920 (1941), *Dillwood*, 42 Cal. App. at 607, *and Coburn*, 130 Cal. 636.

438. *See supra* note 33 and accompanying text.

439. *See Reuter*, 220 Cal. at 323, *quoting* Knowles v. Yates, 31 Cal. 82, 89 (1866). "Contemporaneous exposition has ever been esteemed by jurists and statesmen as strong evidence in support of an interpretation or construction of a statute, or of a provision of the organic law in consonance with such expression." *Id.*

440. *See* Cal. Assembly Interim Comm. on Mun. & County Gov't, *supra* note 428, at 18-19.

pervisors Association of California ("CSAC") expressed the counties' concern about their ability to site locally unwanted land uses, like county jails, within cities.[441] However, the CSAC spokesman thought that localities could work out their differences outside of the courts, without requiring new legislation.[442]

According to the report, the most important aspect of the *Hall* case is "whether or not districts other than school districts should be immune to local regulation and zoning."[443] Several solutions to this perceived problem were bandied about, most suggesting some kind of waiver by the State of its immunity as it related to school districts and other state agencies.

Presumably acting on what they had learned, two members of the Interim Committee introduced Assembly Bill 156 ("A.B. 156")[444] to waive sovereign immunity for "local agencies of the state" and to subject them to local land use regulation.[445] The Legislature passed A.B. 156 and then codified it as Government Code Sections 53090-53095,[446] with the intent to vest cities and counties with control over zoning and building restrictions,[447] thereby strengthening local planning authority.[448]

The Legislature expressly stated that the statutes apply to "each local agency,"[449] a term defined as: "an agency of the state for the local performance of governmental or proprietary functions within limited boundaries."[450] In the background study for the bill, this type

441. *See id.* at 19.

442. *See id.*

443. *See id.* at 17.

444. Interim Committee members William Biddick, Jr. and Carl A. Britschgi, introduced the bill early in 1959. *See* Cal. Legis., Assem. Bills 1959 Regular Session, A.B. 80-199, Assembly Bill No. 156 (Jan. 12, 1959, original draft).

445. *See* City of Lafayette v. East Bay Mun. Utils. Dist., 16 Cal. App. 4th 1005, 1013-14 (1993); *accord* Baldwin Park County Water Dist. v. County of Los Angeles, 208 Cal. App. 2d 87, 95-96 (1962); City of Santa Clara v. Santa Clara Unified Sch. Dist., 22 Cal. App. 3d 152, 157 (1971), *review denied*, Feb. 16, 1972; City of Santa Cruz v. Santa Cruz Sch. Bd. of Educ., 210 Cal. App. 3d 1, 5 (1989); 40 Cal. Att'y Gen. Op. 243, 246 (1962); *see also* Cal. Legis., Assem. Bills 1959 Regular Session, A.B. 80-199, Assembly Bill No. 156 (Jan. 12, 1959, original draft), Legislative Counsel's Digest (A.B. 156 "[r]equir[es] each local agency (excluding a city or county) to comply with all applicable building and zoning ordinances of the county or city in which the local agency is situated.").

446. CAL. GOV'T CODE §§ 53090-53095 (West 1997).

447. *But see* Modesto Irrigation Dist. v. City of Modesto, 210 Cal. App. 2d 652, 656-57 (1962) (Government Code §§ 53090-95 do not apply to Subdivision Map Act).

448. *See City of Lafayette*, 16 Cal. App. 4th at 1014, *citing* Lawler v. City of Redding, 7 Cal. App. 4th 778, 783 (1992), *Modesto Irrigation Dist.*, 210 Cal. App. 2d at 656 *and* 37 Cal. Att'y Gen. Op. 89, 91 (1961).

449. *See* CAL. GOV'T CODE § 53091 (West 1997).

450. *Id.* § 53090(a).

of entity was referred to more succinctly as "local agencies of the state."[451]

Courts have since held that the class essentially includes all local government agencies except counties, cities, and consolidated counties and cities. For example, local state agencies include redevelopment agencies[452] and school districts,[453] but, the class does not include State agencies that are not "local," but instead operate statewide, like the University of California.[454]

b. Relying on an erroneous opinion by the Office of the California Attorney General, California courts have misinterpreted A.B. 156.

The most fundamental rule of statutory construction is that a court should ascertain the legislature's intent so as to effectuate the purpose of the law.[455] In determining the government bodies to which A.B. 156 applied, the Legislature expressly excluded the following: (1) the State, (2) counties, (3) cities, and (4) certain special districts handling transit functions.[456]

Incredibly, California courts have interpreted this exclusionary provision to mean that the Legislature intended to exempt all counties and cities from having to comply with other counties' and cities' building and zoning ordinances.[457] Although some of these court decisions

451. *See* Cal. Assembly Interim Comm. on Mun. & County Gov't, *supra* note 428, at 7.

452. *See, e.g., City of Lafayette*, 16 Cal. App. 4th at 1013 (municipal utilities districts); *Kehoe, supra* note 303, 67 Cal. App. at 673 (redevelopment agencies); 55 Cal. Att'y Gen. Op. 375, 376 (1972) (local hospital districts); 37 Cal. Att'y Gen. Op. 89, 90 (1961) (irrigation districts).

453. *See, e.g., Santa Cruz Sch. Bd. of Educ.*, 210 Cal. App. 3d at 6-7 (school district); *Santa Clara Unified Sch. Dist.*, 22 Cal. App. 3d at 156-158 (same).

454. *See City of Santa Monica*, 77 Cal. App. 3d at 136-37. According to the A.G., district agricultural associations are not "local" agencies of the State either. *See* 56 Cal. Att'y Gen. Op. 210, 215 (1973).

455. *See* California Teachers Ass'n v. San Diego Community College Dist., 28 Cal. 3d 692, 698 (1981); Moyer v. Workmen's Compensation Appeals Bd., 10 Cal. 3d 222, 230 (1973); Select Base Materials v. Bd. of Equalization, 51 Cal. 2d 640, 645 (1959).

456. *See* CAL. GOV'T CODE § 53090(a) (West 1997). There are special immunity rules for water districts. Water districts are generally required to comply with the building and zoning ordinances of the county or city in which they are located, but they are immune from those ordinances regulating construction of facilities directly and immediately used for the protection and generation, of water, and merely related to storage or transmission of water. *See id.* §§ 53091, 53096; *City of Lafayette*, 16 Cal. App. 4th at 1015-16; *accord Baldwin Park County Water Dist.*, 208 Cal. App. 2d at 95-96; 78 Cal. Att'y Gen. Op. 31, 36-37 (1995). Courts narrowly construe these exceptions for water districts. *See* 78 Cal. Att'y Gen. Op. at 35-36, *citing City of Lafayette*, 16 Cal. App. 4th at 1017.

457. *See, e.g., Akins*, 67 Cal. 3d at 194 (county); *Lawler*, 7 Cal. App. 4th at 783 (city); *County of Los Angeles*, 212 Cal. App. 2d at 166 (county); County of San Mateo v. Bartole,

reach the right result, they rest on a single erroneous opinion by the Office of the California Attorney General ("A.G."),[458] who misinterpreted the Legislature's intent, if the A.G. considered it at all.

c. The California Attorney General did not give the statutes their plain meaning.

To construe a statute, California courts first look to its language, attempting to give effect to the usual, ordinary import of that language, and seeking to avoid mere surplusage.[459] The A.G.'s facial analysis of the intergovernmental immunity statutes was limited to a single, declaratory paragraph:

> If the Legislature had not specifically exempted cities and counties after the use of the phrase, " 'Local agency' means an agency of the State for the local performance of governmental or proprietary function within limited boundaries," an immediate question would have arisen as to whether those entities had to comply with all building and zoning ordinances as set forth in section 53091. *By the specific listing of these agencies as not being included as an affected agency in section 53090, it is clear that the Legislature did not intend cities and counties to be subject to building and zoning ordinances.*[460]

However, the exemption of counties and cities from Government Code Sections 53090 and 53091 does not mean that they are necessarily immune from local ordinances regulating land use. The only logical conclusion from the statutes' plain language is that the Legislature intended to ensure that "local agencies of the state," as defined in Section 53090(a), are *not* immune from local land use regulation. There is no textual basis to find that the statutory scheme in any way granted immunity. Rather, the Legislature's words merely waive sovereign immunity for only those state agencies it defined through exclusion of all other possibilities.

184 Cal. App. 2d 422, 434 (1960) (county); 57 Cal. Att'y Gen. Op. 124, 126 (1974) (county); *see also* 38 Cal. Att'y Gen. Op. 156, 157-58 (1961) (city-owned improvements included in assessment district but lying in unincorporated county territory are an extension of the city, so they are immune from county ordinances).

458. *See, e.g., Lawler*, 7 Cal. App. 4th at 783 *and Akins*, 67 Cal. 3d at 194, *both citing* 40 Cal. Att'y Gen. Op. 243, at 245.

459. *See California Teachers Ass'n*, 28 Cal. 3d at 698; *Moyer*, 10 Cal. 3d at 230; *Select Base Materials*, 51 Cal. 2d at 645; *see also* Lungren v. Deukmejian, 45 Cal. 3d 727, 734 (1988) (normally, legislative intent is apparent from the enactment's language alone).

460. 40 Cal. Att'y Gen. Op. 243 at 245 (emphasis added).

Furthermore, the A.G.'s opinion fails to harmonize A.B. 156 with constitutional law.[461] As the Legislative Counsel explained in his letter to the Interim Committee, there are important constitutional differences between California counties and cities,[462] as there are between the State and localities. The Attorney General's opinion does not account for these differences.

Assuming *arguendo* that a legislative intent to grant intergovernmental immunity to cities and counties could be shown by negative implication from the definition of local state agencies, why would the Legislature have made such a grant to itself—"the State?"[463] Under California's Sovereign Immunity Doctrine, the State is never subject to its own regulations,[464] or those even of Home Rule localities, unless it expressly says so.[465] Furthermore, counties are subdivisions of the State,[466] so the State cannot waive its sovereignty as exercised by counties without doing so expressly.[467] Therefore, A.B. 156 could not immunize cities from county land use regulations by mere implication, as the A.G. wrongly assumed.

d. The statutes' legislative history does not support but contradicts the Attorney General's opinion.

Nor does the legislative history of A.B. 156 support the A.G.'s opinion. Reading the enacted statutes to give an exemption to counties and cities from one another's land use controls contradicts the State Legislature's undisputed intent in passing them: to invest in cities and in counties control over zoning and building restrictions, thereby *strengthening* local planning authority.[468]

461. *See County of Marin.*, 53 Cal. 2d at 638, 639; *Riley*, 6 Cal. 2d at 627; California Housing Finance Agency v. Elliott, 17 Cal. 3d 575, 594 (1976) (same).

462. *See supra* part I.A.ii.

463. As initially proposed, Government Code Section 53090(a) defined local agencies of the state to exclude "a city or a county". *See* Cal. Legis., Assem. Bills 1959 Regular Session, A.B. 80-199, Assembly Bill No. 156 (Jan. 12, 1959, original draft). The Assembly amended the definition to also exclude the San Francisco Port Authority, s*ee id.* (Apr. 28, 1959, draft), and, in the bill's final iteration, the Senate added "the State." *See id.* (May 22, 1959, draft).

464. *See supra* part III.C.i.b.

465. *See supra* part III.C.i.c.

466. *See supra* note 259.

467. *See supra* part III.C.i.d.

468. *See City of Lafayette*, 16 Cal. App. 4th at 1014, *citing Lawler*, 7 Cal. App. 4th at 783, *Modesto Irrigation Dist.*, 210 Cal. App. 2d at 656 *and* 37 Cal. Att'y Gen. Op. 89, 91 (1961).

As the Attorney General acknowledged in his opinion,[469] the Legislature acted on the basis of the Interim Committee's published study.[470] The study is relevant because statutory construction should take into account matters such as context, the object in view, the evils to be remedied, and the history of the times.[471] According to the study, neither any witness nor the Interim Committee itself suggested that the Legislature grant immunity from local regulations, not even to cities as a *quid pro quo* for letting counties have their way.[472] On the contrary, the Interim Committee approached intergovernmental immunity as a problem,[473] which it suggested the Legislature either ameliorate by waiving some of its agencies' immunity from local land use regulation, or leave alone.[474]

Furthermore, it was two members of the Interim Committee who sponsored A.B. 156. Normally, courts will not consider the motives or understandings of individual legislators who authored a bill because the others who supported their proposal may not have shared their views.[475] However, legislators' statements should be considered when they reiterate legislative discussion leading to the adoption of proposed amendments rather than when they merely express personal opinion.[476] That exception applies here.

In sum, there is no evidence that the Legislature ever intended to express any opinion about intergovernmental immunity where "local agencies of the state" were not involved. In fact, as discussed above, what evidence there is suggests the opposite intention. Finally, even if the Legislature had intended to positively immunize counties and cit-

469. *See* 40 Cal. Att'y Gen. Op. 243, at 245.

470. To ascertain legislative intent, courts may rely upon committee reports provided they are consistent with a reasonable interpretation of the statute. *See* Smith v. Rhea, 72 Cal. App. 3d 361, 369 (1977).

471. *See* Cossack v. City of Los Angeles, 11 Cal. 3d 726, 733 (1974).

472. *See* Cal. Assembly Interim Comm. on Mun. & County Gov't, *supra* note 429, at 8-14 (discussing school building issue), at 15-17 (discussing zoning issue), at 18-19 (discussing sovereign immunity issue), at 23 ("Principal Witnesses Recommendations").

473. *See id.* at 7.

474. *See id.* at 23 ("Principal Witness Recommendations"); *see, e.g., id.* at 13 (witnesses suggest empowering local jurisdictions to enforce ordinances with higher standards against school districts).

475. *See California Teachers Ass'n*, 28 Cal. 3d at 698; *accord In re* Marriage of Bouquet, 16 Cal. 3d 583, 589-90 (1976), *limited by* Evangelatos v. Super. Ct., 44 Cal. 3d 1188, 1209 (1988).

476. *See California Teachers Ass'n*, 28 Cal. 3d at 698; *accord Marriage of Bouquet*, 16 Cal. 3d at 589-90.

ies from each other's ordinances, it had to do so expressly. Even the A.G. recognized that the Legislature did not do this.[477]

iii. Reconciling Sovereign Immunity with A.B. 156

The Legislature had a particular intent in passing A.B. 156. Bringing together those statutes with the Sovereign Immunity Doctrine allows us to answer the five questions posed before: (1) May a county or a city regulate a special district, (2) May a county regulate the internal activities of a city or of another county, (3) May a city regulate a county's external activities, (4) May a county regulate the external activities of a city or county, and (5) May a city regulate another city's external activities?

a. Neither a county nor a city may regulate a special district unless given statutory authority to do so.

Although most special districts are "public corporations" operating only locally, they are all agencies of the State.[478] Therefore, no locality may regulate special districts unless the Legislature has granted specific statutory authority for it to do so.[479] Of course, if it wishes, the State may waive the immunity of its various agencies. That is exactly what the State has done in enacting A.B. 156 for "local agencies of the state."[480] In comparison, the State has chosen not to waive immunity for its other agencies, such as the University of California,[481] or, as just shown, for counties.[482]

b. A county may not regulate another county or city's internal activities.

The police powers given to a county and to a city by the State Constitution may be exercised by each only within their respective

477. *See* 40 Cal. Att'y Gen. Op. 243, at 245, 246.

478. *See supra* part III.A.iii.

479. *See* Rodeo Sanitary Dist. v. Bd. of Supervisors, 71 Cal. App. 4th 1443, 1447 (1999).

480. *See supra* part III.C.ii.a. The State may also allow local residents to vote on whether or not to form a special district. *See* VAN ALSTYNE, *supra* note 43, at 328, *citing* City of Whittaker v. Dixon, 24 Cal. 2d 664, 667 (1944) (State may delegate decision to city commission whether to activate vehicle parking district).

481. *C.f. City of Santa Monica*, 77 Cal. App. 3d at 136-37 (no mention of California Government Code Section 53090). The University of California has long enjoyed immunity from local regulation. *See* Williams v. Wheeler, 23 Cal. App. 619, 622-23 (1913) (Constitution of 1879 elevated University of California to the dignity of a constitutional department or function of the State). Even the Eleventh Amendment applies. *See* Regents of the Univ. of California v. John Doe, 519 U.S. 425 (1997).

482. *See supra* parts III.C.ii.c., III.C.ii.d.

territorial jurisdictions.[483] Consequently, one county cannot regulate another county when the latter acts within the confines of its own territorial jurisdiction. Similarly, a county, chartered or not, cannot regulate a city's internal affairs.

The State Legislature may empower one governmental agency, such as a county, to perform functions for another governmental agency, such as a city.[484] However, while counties are rarely able to use Home Rule as a shield against the State,[485] chartered cities can use this defense in the area of municipal affairs.[486] Hence, the State could not empower one of its agencies, not even a county, to intrude on chartered cities' municipal affairs.

c. No city, even if chartered, may regulate a county, no matter where the county's activities occur, unless it has specific statutory authority to do so.

In *Lawler v. City of Redding*,[487] a California court of appeal cited the A.G.'s analysis of A.B. 156 to hold that a city may develop proprietary land in an unincorporated area without having to comply with the county's general plan.[488] Apparently, Lawler had argued against the A.G.'s reasoning, but the court refused to question it because the plaintiff had not cited any authority to support a contrary view.[489] Thus, the *Lawler* court took the final, illogical step on the path laid out by the A.G. by holding that municipal corporations are immune from regulations by a subdivision of the State.

There is little benefit in recapping the flaws in the A.G.'s opinion. Significantly, where California courts have not relied on it, they have reached the right result. For example, they have held that any locality, including a city, when exercising an interest in public improvements deemed to jointly benefit publicly owned and used property, may include county-owned property for tax assessments.[490] However, this is true only where the Legislature expressly permits it.[491]

483. *See supra* note 267.

484. *See* Los Angeles County v. Super. Ct., 17 Cal. 2d 707 (1941).

485. *See supra* part III.A.iii.

486. *See supra* part III.A.ii.b.

487. 7 Cal. App. 4th 778.

488. *See id.* at 783.

489. *See id.* at 783 n.9.

490. *See County of Santa Barbara*, 59 Cal. App. 3d at 370, *citing* City of Saratoga v. Huff, 24 Cal. App. 3d 978 (1972).

491. *See id., citing City of Inglewood*, 207 Cal. at 707.

The reasoning begins with the premise that counties are political subdivisions of the State,[492] and perform many functions that are state functions. Therefore, a county's operation and maintenance of its property is a state function[493] which a city may not regulate. California courts have used this reasoning many times to immunize counties from city land use regulation.[494]

d. A county may regulate a city's external activities even without express statutory authority to do so, but it probably may not regulate another county without such authority from the Legislature.

The California Supreme Court has held that a county is, for certain purposes, "sovereign" because it is "a portion of the State Government."[495] Furthermore, unlike a city, a county is not a corporation and therefore, not a legal "person."[496] Therefore, California courts hold that a county may invoke immunity from city ordinances.[497]

In contrast, a municipal corporation is not constitutionally equivalent to a county.[498] Counties are legal subdivisions of the State, created by the sovereign power of the State without particular solicitation, consent, or concurrent action of inhabitants.[499] Municipal corpo-

492. *See supra* note 260.

493. *See County of Marin*, 53 Cal. 2d at 638; *c.f. Reclamation Dist. No. 1500*, 171 Cal. at 679-80 ("In the absence of constitutional restrictions, the Legislature has full control of the property held by counties as agencies of the state, and may dispose of that property without the consent of the county or without compensating it.").

494. *See, e.g.*, Los Angeles County v. Byram, 36 Cal. 2d 694, 699 (1951) (board of supervisors provision of suitable quarters for the municipal and superior courts is an administrative function delegated by the State to the local governing body); *Hite*, 36 Cal. 2d at 130-31 (same); *Vagim*, 230 Cal. App. 2d 293 (counties need not consult with local authorities in any manner when deciding where to locate a new courthouse on county land); *see also* 15 Cal. Att'y Gen. Op. 67, 68 (1950) (city may not tax a county performing a State function).

495. *See Sharp*, 34 Cal. at 290, *citing Hunsacker*, 5 Cal. at 290 (creditor of county has no remedy by virtue of county's derivative sovereignty).

496. Of course, the Legislature has empowered California counties to behave as if they were legal persons in many situations. For example, county boards of supervisors may acquire real and personal property for county purposes by purchase, gift, lease or condemnation. *See* Cal. Gov't Code §§25351 (public buildings), 25351.3 (land and buildings and other facilities), 2352 (machinery); Reinking v. County of Orange, 9 Cal. App. 3d 1024; 45 Cal. Jur.3d, Municipalities, § 310, at 461.

497. *See, e.g., Hunsacker*, 5 Cal. at 290 (holding that county cannot be sued).

498. *See Riley*, 6 Cal. 2d at 627; *Estate of Miller*, 5 Cal. 2d at 597; People *ex rel.* Graves, 81 Cal. at 498; *Bd. of Supervisors of Sacramento County*, 45 Cal. 692; Southern California Utils. v. City of Huntington Park, 32 F.2d 868 (1929), *cert. denied*, 280 U.S. 587 (1929); *c.f. Colusa County*, 44 Cal. App. 2d at 920 (counties are "state agencies" and are no more liable than the State for injuries caused by their employees' negligence in performance of governmental functions, but cities are "municipal corporations," not state agencies).

499. *See supra* note 31.

rations, on the other hand, are called into existence through direct solicitation or by free consent of the people composing them.[500] Since the passage of A.B. 156 in May 1959, at least one appellate court has used this reasoning instead of A.B. 156 to uphold counties' immunity from local ordinances.[501]

In addition, although counties are constitutional equals to each other, this status exists only when they operate within their own territorial jurisdictions. It would seem, then, that a county may also regulate another county's external activities.[502] However, a county's governmental functions are delegated by the State, so when performing such functions, within its territorial jurisdiction, it is entitled to the State's sovereignty. Sometimes, a county's proprietary functions are also delegated by the State, as in the construction of a county jail. As a result, when the Legislature delegates such a function to a county to exercise outside of its normal territory, that county acts with the State's sovereignty. Therefore, because the State must expressly waive immunity from its own regulations, a county is presumptively immune from other counties' land use regulations.

e. A general law city may regulate another city's external activities.

There can never coexist within the same territory, two distinct municipal corporations exercising the same powers, jurisdiction, and privileges.[503] Furthermore, there is no logical basis for allowing a municipal corporation to flout the laws of another municipal corporation.

500. *See id.*

501. *See Bartole*, 184 Cal. App. 2d at 434 (the board of supervisors can override decisions of the municipality with respect to the zoning of county-owned property, citing Cal. Gov't Code § 65554 and *Town of Atherton*, 159 Cal. App. 2d at 423, 428).

502. Even a chartered local government's regulations may not exceed its territorial jurisdiction. In determining whether land use regulations are reasonably related to the public welfare, courts will look to the public welfare of the entire affected region, not just the public welfare of the local government's citizens. *See Associated Home Builders*, 18 Cal. 3d 582 ("[M]unicipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance, superficially reasonable from the limited standpoint of the municipality may be discerned as unreasonable when viewed from a larger perspective."); Arnel Dev. Co. v. City of Costa Mesa, 126 Cal. App. 3d 330, 338 (1981) (applying "*Livermore* tests" to invalidate rezoning initiative operating to preclude multi-family housing project and thereby failing to reasonably accommodate regional housing needs).

503. *See* Allied Amusement Co. of Los Angles v. Bryam, 201 Cal. 316, 319-29 (1927); *accord Henshaw*, 176 Cal. at 509; E. D. & A. L. Stone Co. v. Reilly, 158 Cal. 466 (1910); *East Fruitvale Sanitary Dist.*, 158 Cal. at 457; Ex parte *Roach*, 104 Cal. at 277 (quoting Judge Dillon); City of Burlingame v. San Mateo County, 103 Cal. App. 2d 885, 888 (1951).

For example, in *City of South Pasadena v. City of San Gabriel*,[504] South Pasadena owned a tract of land in San Gabriel, where it intended to drill a well to supplement its water supply. By ordinance, San Gabriel required anyone wishing to drill wells within its jurisdiction to first obtain a permit, and it refused South Pasadena's permit application.[505] The District Court of Appeals rejected South Pasadena's attempt to compel issuance of the permit by writ of mandate, and explained that sovereign immunity was irrelevant in the case:

> South Pasadena attempts to make much of the fact that in the operation of its water plant it is engaged in the discharge of a sacred trust in behalf of the beneficiaries thereof . . . . It is contended, in effect, that because of this circumstance South Pasadena was entitled to special consideration . . . . We think the circumstance leads to the contrary conclusion. San Gabriel, too, is engaged in the administration of a trust, that of protecting its people from dangers to their health, comfort and general welfare. San Gabriel is not concerned with the trust with which South Pasadena burdened itself . . . if the execution of the latter trust improperly impinges upon the rights of the people of San Gabriel. . . . Under the law South Pasadena could not levy such a tribute upon San Gabriel as would have been paid if the permit had been granted.[506]

The logic of the *City of South Pasadena* case still rings true.

D. Summary of Legal Framework

Current California case law holds that counties, cities, and consolidated cities-and-counties need not comply with any other localities' land use regulations. As it happens, they usually comply anyway. Generally, they do not want to harm relations with neighboring local governments, but there are non-political factors at work, too. For example, environmental statutes, like the California Environmental Quality Act,[507] serve as a second line of land use planning defense.[508]

504. 134 Cal. App. 403 (1933), *review denied*, Nov. 27, 1933, *appeal dismissed*, 292 U.S. 602 (1934).

505. *See id.* at 406.

506. *See id.* at 416-17, *quoted with approval in Sunny Slope Water Co.*, 1 Cal. 2d at 97-98.

507. CAL. PUB. RES. CODE §§ 21000-21178.1 (West 1996).

508. Under CEQA both public and private projects that have a "significant environmental effect" require the preparation of an Environmental Impact Report ("E.I.R."). *See id.* § 21165 (West 1996); Friends of Mammoth v. Bd. Supervisors, 8 Cal. 3d 247 (1972); CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW, *supra* note 236, p. 87. Some intergovernmental cooperation also comes of the statutory prohibition on counties and special districts' acquiring, building, or disposing of real property outside of their boundaries with-

Further, owners of property adjacent to government property have a constitutional right to reasonable notice and opportunity to be heard prior to an adjudicative decision on a proposed project that will deprive those owners of a significant property interest.[509]

It is good public policy that a locality should be immune from the regulations of other localities when it is performing a state-directed task, such as constructing a jail. Conversely, a city should not be entitled to ignore local land use regulations when it uses its property for profit.[510] Counties are different. Because they are subdivisions of the State,[511] they share the State's presumptive immunity from all State and local regulation.

The City and County of San Francisco is a unique case because it exercises the functions of both city and county.[512] For example, San Francisco plans to develop a golf course and residential subdivision on its surplus land in Alameda County.[513] Courts have construed A.B. 156 to immunize San Francisco from having to comply with local land

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out first having submitted such projects for review by the planning agency of the county or city with territorial jurisdiction. (Cal. Gov't Code § 65402(b)-(c).) The planning agency then has forty days to check the project for conformity with the relevant general plan and make a report. (*Id.*) Of course, the holding in *Lawler* makes this check and report purely advisory.

509. *See* Horn v. City of Ventura, 24 Cal. 3d 605, 612-13 (1979).

510. The State Constitution immunizes local governments' property from taxation, regardless of profit motive. *See* CAL. CONST. art. XIII, § 3(b). However, when such property is located in other local jurisdictions it is subject to taxation. *See id.*, § 11; *see generally* City and County of San Francisco v. County of San Mateo, 10 Cal. 4th 554 (1995). In 1960, San Francisco Mayor George Christopher complained to the Governor's Commission on Metropolitan Problems that his city paid over $600,000 in property taxes to San Mateo County on its 23,000 acres of watershed and for San Francisco International Airport. *See* Hon. George Christopher, *Statement, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1, at 47-48. For property owned by San Francisco's Water Department, Christopher reported over $350,000 in property taxes paid to Alameda County, over $20,000 paid to Santa Clara County, and nearly $30,000 paid to Tuolumne, Mariposa, Stanislaus and San Joaquin counties. *See id.* Christopher thought it especially unjust that his city should pay so much to San Mateo County when the airport had done so much to stimulate the local economy. San Francisco's argument is the same as that made by business owners the world over. Perhaps, the key determinant should have been whether the Water Department and the airport were profit-seeking operations.

511. *See supra* note 260.

512. *See Dineen*, 38 Cal. App. at 490, *citing Keyes*, 177 Cal. at 323-24 *and Nicholl*, 157 Cal. 416.

513. *See* CITY OF PLEASANTON AND SAN FRANCISCO WATER DEPARTMENT, STATE OFFICE OF PLANNING & RESEARCH CLEARINGHOUSE NO. 96-013005, FINAL ENVIRONMENTAL IMPACT REPORT: BERNAL PROPERTY, CITY OF PLEASANTON PROJECT NO. SP-95-02, SPECIFIC PLAN, DEVELOPMENT AGREEMENT, PREZONING, AND OTHER RELATED ACTIONS 5-16 (May 1999).

use laws, though San Francisco has done so voluntarily.[514] Although the courts' reasoning is wrong, the result may be correct. San Francisco's county status gives it sovereign immunity, so it need not comply with laws unless the State Legislature affirmatively requires it. On the other hand, San Francisco would operate as a developer in Alameda County, not only outside of its territorial jurisdiction, but in search of profit.

The sovereign immunity doctrine has fallen into disrepair in the California courts, which tend to think that the distinction between governmental and proprietary activities is old-fashioned and unworkable. In fact, when deciding tort cases, the courts have not missed sovereign immunity much.[515] Yet, when deciding cases involving intergovernmental relations, the courts are hopelessly lost without the doctrine's careful legal distinctions. Lacking a new, coherent theory by which to distinguish between the State, counties, cities, chartered counties, chartered cities, chartered cities-and-counties, and special districts, California courts become understandably confused.

If political realities were all that mattered, this might be irrelevant. However, any land use decision reached in violation of the constitution is vulnerable to attack in the courts. Without a firm constitutional basis, no regulatory scheme is viable. If California counties are to serve a supervisory role in regional planning, courts must recognize their superior constitutional status to cities. Either that, or the State Constitution must be revised yet again.

514. Although in an area addressed by the Alameda County's East County Area Plan, the project site also lies within the City of Pleasanton's planning area and its sphere of influence. San Francisco has chosen to seek land use entitlements from Pleasanton. *See* CITY OF PLEASANTON AND SAN FRANCISCO WATER DEPARTMENT, STATE OFFICE OF PLANNING & RESEARCH CLEARINGHOUSE NO. 96-013005, DRAFT ENVIRONMENTAL IMPACT REPORT: BERNAL PROPERTY, CITY OF PLEASANTON PROJECT NO. SP-95-02, SPECIFIC PLAN, DEVELOPMENT AGREEMENT, PREZONING, AND OTHER RELATED ACTIONS 4-6 (May 1997).

515. The California Tort Claims Act establishes public entities' complete non-liability for injuries arising outside of contract or constitutional provisions, but permits exceptions by specific statute. *See* Odello Bros. v. County of Monterey, 63 Cal. App. 4th 778, 792 (1998) (quoting CAL. GOV'T CODE § 815, Legis. Com. Comment—Sen. at ¶1 (West 1985)), *review denied* Aug. 12, 1998. Thus, the Legislature has abolished all common law or judicially declared forms of government liability in California, and set out "with precision and clarity" the rights and duties of claimants and public entities. *See* Stanley v. City and County of San Francisco, 48 Cal. App. 3d 575, 579 (1975).

IV. A Suggested Strategy for County-Based Regional Planning in California

Having first traced the political history of California counties in Section II, Section III explained how they are uniquely positioned under State law to make intergovernmental land use decisions. In this final section, I propose a strategy for regional planning based on county government, and suggest how it might happen.

Theoretically, California's regional planning strategy need not be based on institutions at all. Comprehensive planning based upon building consensus among all interested parties presents a compelling alternative.[516] Recently, the consensus-building model has been used to address several regional problems in California; most notably the allocation of water rights among environmental, residential and farming interests under the CALFED Bay-Delta Program.[517] However, while useful in some cases, it is unclear how a consensus-based strategy can compel compliance with its resulting decisions.[518] Moreover, the model is *ad hoc* because it can only work when stakeholders respond to particular issues.

California's regional problems arise because there is little incentive for local governments to care about their nonresidents or, for that matter, non-voters. In contrast, government institutions have the advantage of compelling cooperation. Just because there are few institutions currently serving this function in regard to regional planning, does not mean it must be so.

California counties are not the only institutions that could serve in this role. As noted in Section I, planners tend to favor creating new regional bodies, such as special districts, that are custom-tailored for

516. *See generally*, Judith E. Innes, *Planning Through Consensus Building: A New View of the Comprehensive Planning Ideal,* 62 J. AM. PLAN. ASS'N 460 (1996).

517. CALFED is a consortium formed in 1994 of state and federal agencies with management and regulatory responsibilities in the Bay-Delta. CALFED Bay-Delta Program Overview, CALFED, http://calfed.ca.gov/general/overview.html; *Framework Agreement*, CALFED, http://calfed.ca.gov/historical/framework.html; *see also* 110 Stat. 3009-748 (1996), Pub. L. 104-208, Div. E, Title I (California Bay-Delta Environmental Enhancement and Water Security Act). CALFED's massive draft plan took four years to complete. *See CALFED Announces Plan for Bay-Delta*, CALFED, June 25, 1999, http://calfed.ca.gov/events/announce.html.

518. The consensus-based model assumes that public policy is merely the result of consensual agreement by competing groups. *See Innes, supra* note 512, at 463, 465. While it is vital to involve stakeholders in planning decisions, allowing consensus to rule supreme renders planners into apolitical technicians, an undesirable, and perhaps impossible, result. Our constitutional systems, both national and state, do not rely upon unanimity. Rather, they assume that good public policy often requires implementing unpopular policies, and protecting minority viewpoints.

each region's particular problems. The California Legislature probably cannot transfer all county and city functions to special districts,[519] but it may wholly preempt land use planning and implementation schemes, like zoning. The Legislature could create a single special district able to control planning and land use approvals made within that district's territory. In fact, the Legislature employed this method in creating the Tahoe Regional Planning Agency ("TRPA").[520]

Unfortunately, TRPA is a poor model of California regional planning for several reasons.[521] First, while TRPA has express authority to devise a regional plan and to effectuate it by all necessary means,[522] TRPA has no role in the city formation process.[523] That task falls to county-based LAFCOs.[524] Second, Lake Tahoe is a unique natural resource.[525] Except where other such resources are at stake—the California coastline, or the waters of San Francisco Bay—regional schemes regularly fail in California for overambition.

An attempt from 1974 is illustrative. That year, Assemblyman John Knox introduced Assembly Bill 2040 ("A.B. 2040"), which would have created a new planning agency for the San Francisco Bay Area, the Association of Bay Area Governments ("ABAG") in place of its council of governments ("COG").[526] The new agency was to govern several special districts in the Bay Area, including its clearing-

519. The State Constitution vests general police power only in counties and cities. Consequently, the State Constitution probably forbids the Legislature from transferring *all* county and city functions to special districts. *See* Ex parte *Daniels*, 183 Cal. at 641 ("[A]n act by the legislature in general terms that the local legislative body would have no power to enact sanitary or other regulations, while in a sense a general law would have for its effective purpose the nullification of the constitutional grant, and therefore, be invalid.")

520. *See Younger I*, 5 Cal. 3d at 497; *see generally* Gary J. Spradling, *Regional Government for Lake Tahoe*, 22 HASTINGS L. J. 705 (1971). In *Younger I*, the court observed cryptically that only regional planning and zoning were at issue, not *local* planning and zoning. *See Younger I*, 5 Cal. 3d at 497. The court did not say where one ends and the other begins.

521. An obvious reason is that TRPA's enabling act, the Tahoe Regional Planning Compact, *see* CAL. GOV'T CODE §§ 66800-66901 (West 1997), required Congressional approval, making it a product of federal law. *See* Jacobson v. Tahoe Reg'l Planning Agency, 566 F.2d 1353, 1358 (9th Cir. 1977), *aff'd in part, rev'd in part sub. nom.* Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391 (1979). Of course, this fact does not prevent California from setting up similar agencies without interstate jurisdiction.

522. *Se* CAL. GOV'T CODE § 67109 (West 1997).

523. *See id.*

524. *See supra* part I.C.ii.

525. *See Younger I*, 5 Cal. 3d at 485.

526. *See* Brunetti, *supra* note 1, 42 HASTINGS L.J. at 1115, *citing* A.B. 2040, Cal. Legis. Reg. Sess. 1974, at 3 (as amended by Senate on Aug. 5, 1974).

house for transportation funds, the Metropolitan Transportation Commission ("M.T.C.")[527], and B.C.D.C.[528]

A.B. 2040's mistake was to grant the new agency power to review and comment upon any application by a city, county, or special district for state or federal funds for any project deemed to have a regional impact.[529] Posing such a direct threat to dollars alarmed local officials, and A.B. 2040 died in the Senate, albeit by a close vote.[530]

Creating a new level of regional government, no matter how limited its powers, has often suffered from bad public relations in California. A decade before A.B. 2040, a regional Bay Area government that was to serve as an advisor in regional planning died amid accusations of "metropolitan supergovernment."[531] Still other efforts during this century sought to consolidate counties or create new consolidated cities-and-counties; some using a federal model.[532] These all failed.[533] Today, statutory requirements for county consolidation are stringent,[534] and county residents remain jealous of their autonomy.[535]

527. M.T.C. serves as the Bay Area's "metropolitan planning organization," or "MPO," for the purpose of earning federal transportation grants. *See* CAL. GOV'T CODE §§ 66500-66532 (West 1997) (Metropolitan Transportation Commission Act).

528. *See id., citing* A.B. 2040, Cal. Legis. Reg. Sess. 1974, at 35 (as amended by Senate on Aug. 5, 1974).

529. *See id., citing* A.B. 2040, Cal. Legis. Reg. Sess. 1974, at 27-28 (as amended by Senate on Aug. 5, 1974).

530. *See id., citing* Cal. Legis., Sen. Local Gov't Comm., hearing on A.B. 2040—Bay Area Regional Planning Agency, May 17, 1974, held in City and County of San Francisco, at 45-65, 108-13, 114-16.

531. *See* BOLLENS & SCOTT, *supra* note 84, at 10.

532. Any time a large city is involved, history has shown that voters living outside it tend to be wary of a merger. *See, e.g.*, William E. Glazer, Pres., Oakland Cham. of Commerce, *Argument Against Initiative measure to Amend Art. XI, § 7*, AMENDMENTS TO CONSTITUTION AND PROPOSED STATUTES WITH ARGUMENTS RESPECTING THE SAME TO BE SUBMITTED TO THE ELECTORS OF THE STATE OF CALIFORNIA AT THE GENERAL ELECTION ON TUESDAY, NOV. 5, 1912, at 23-24 (Sacramento: Super. of State Printing, 1912) (attacking amendment to county consolidation procedure as attempt by City and County of San Francisco to build an empire).

533. *See* SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA, *supra* note 10, at 54-65 (describing failed borough-based consolidation campaigns in Alameda County, and for San Francisco and San Mateo counties); VAN ALSTYNE, *supra* note 43, at 225 (describing failed borough-based consolidation of San Francisco and San Mateo counties); BOLLENS & SCOTT, *supra* note 84, at 9 (describing failed borough-based consolidation campaigns in Alameda County, and for San Francisco and San Mateo counties); Wallace v. Bd. of Supervisors, 2 Cal. 2d 109, 110-12 (1934) (describing failed consolidation of several cities with Alameda County); CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 170.

534. *See supra* part III.B.iii.

535. The 1930 Commission on County Home Rule mentioned rural suspicion of bigger cities as a particular problem, and reported that county consolidation would require careful salesmanship. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 140.

In short, movements for regional government have often begun optimistically, only to end in disappointment. Some regionalists stubbornly persist in playing the role of Charlie Brown trying to kick the football, only to have the voters, like Lucy, yank it away at the last minute.[536] Accordingly, it makes sense to abandon this approach, and try something else.

A county-based strategy for regional planning is more realistic than one that requires eliminating Home Rule. Unlike regional planning authorities, counties already exist. Special districts, councils of governments and the like are more mysterious and, therefore, less compelling to voters than are counties. As political scientists John C. Bollens and Stanley Scott put it, voters do not care about government bodies they have never heard of.[537]

Also, unlike some extant regional bodies, counties already possess general "police power," including the power to plan and implement land use controls.[538] It seems almost irresponsible for regionalists to dream of new organizations governing within ideal jurisdictional lines when counties already exist, spread across the State map.

As currently configured, few California counties correspond to useful regional planning areas.[539] Many counties were obsolete by the time the Gold Rush had ended, when their populations and property values evaporated.[540] Some never made sense.[541] Unfortunately, ob-

536. Because I liked it so much, I have stolen this metaphor directly from the mouth of Michael B. Teitz, of the Public Policy Institute of California. *Michael B. Teitz*, private conversation, May 14, 1998.

537. SCOTT & BOLLENS, *supra* note 10, at 27. Most voters have only heard of government agencies that send them bills for taxes or services. On this score, voters tend to know their municipal utilities districts, like East Bay MUD and Sacramento MUD.

538. Even in California's rural counties, supervisors are accustomed to dealing with land use matters on their dockets. *C.f.* Alvin D. Sokolow, *Legislators and Legislating in County Government, in* LOCAL GOVERNMENT AUTONOMY IN CALIFORNIA, at 32-35 (Linda Martin, ed., 1984) (comparing proceedings of Glenn and Amador county boards of supervisors to those of two comparable bodies in rural Illinois).

539. The County of San Diego nearly corresponds to a logical planning region, but the Mexican City of Tijuana complicates things considerably because it is part of another sovereign nation. *See* CROUCH, ET AL., *supra* note 3, at 261.

540. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 145.

541. *See supra*, note 25. The time-honored example is Alpine County, home to little over a thousand people pressed up against California's border with Nevada. Alpine was carved out of five other counties (El Dorado, Amador, Calaveras, Tuolumne, and Mono) in 1864 without legitimate reason. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 21. The delegates at the 1878-1879 Constitutional Convention mentioned Alpine's creation as one of the follies they hoped new Article XI would arrest. *See, e.g.*, GATES, *supra* note 6, at 1042-43.

scure political machinations have left a legacy of undersized counties with illogical boundaries.[542]

One may also fault counties for their parochialism. The San Francisco Bay Area provides two good examples. Contra Costa County's recalcitrance in addressing regional air quality problems prompted the State, in 1955, to create the Bay Area Air Pollution Control District, today's Bay Area Air Quality Management District.[543] During the 1960s, the counties of San Mateo and Marin withdrew from the San Francisco Bay Area Rapid Transit District ("BART"), which did not need any more help on its way to planning ignominy.[544] Finally, and most importantly, counties cannot regulate matters within incorporated areas.[545]

For these reasons, it seems that counties are not ready-made regional governments. Nevertheless, they are not simply second-rate localities either. Nearly fifty years ago, two distinguished California political scientists, Bollens and Scott, wrote that county planning commissions are the "logical unit to provide coordination and assistance in metropolitan planning."[546] For all their shortcomings, counties remain a viable and logical focus for regional planning in California.[547] Even accepting county boundaries as immutable, giving counties some

542. Sixty years ago, when the automobile was still young, the State's Commission on County Home Rule opined that "modern highways" meant that no California county should cover fewer than 1,000 square miles. *See* CAL. COMM'N ON COUNTY HOME RULE, *supra* note 1, at 83. Sixteen of the State's 58 counties (28%) fall below that arbitrary standard. *See* CALIFORNIA CITIES, TOWNS & COUNTIES, *supra* note 3, at 477 (Alameda), 478 (Alpine), 479 (Amador), 483 (Contra Costa), 497 (Marin), 504 (Napa), 505 (Nevada), 506 (Orange), 510 (Sacramento), 514 (San Francisco), 517 (San Mateo), 520 (Santa Cruz), 522 (Sierra), 524 (Solano), 527 (Sutter), 534 (Yuba).

543. *See* Stanley Scott, *Major Metropolitan Studies and Action Programs in California, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1, at 24, *citing* Cal. Stats. 1955, ch. 1797; Wayne A. Brooks, *The Metropolis, Home Rule, and the Special District: Part I*, 11 HASTINGS L. J. 110, 115 (1959-1960).

544. *See* PETER HALL, GREAT PLANNING DISASTERS, at xvi-xvii, 109-137 (1982); Melvin Webber, *The BART Experience—What Have We Learned?*, PUB. INT. 79-108 (FALL, 1976). At the beginning of the 1960s, San Francisco Mayor George Christopher lamented that the State Legislature itself sabotaged BART by planning $1.5 billion in freeways years before BART began construction. *See* Hon. George Christopher, *Statement, in* GOVERNOR'S COMMISSION ON METROPOLITAN AREA PROBLEMS, METROPOLITAN CALIFORNIA, *supra* note 1, at 49.

545. *See supra* part III.C.iii.b.

546. *See* SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA, *supra* note 10, at 102.

547. *C.f.* JOHN M. WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 50, 52 (1961) (noting California counties' peculiar suitability for regional planning).

oversight over land use decisions made within their boundaries would be a constructive step toward meeting California's regional problems.

Certainly, California's long history of piecemeal, *ad hoc* solutions has not produced a better answer for the State's regional problems than county-level government. County-based regional planning may be unglamorous and imperfect, but, as this article hopes to persuade its readers, California need not address its regional problems through perfect solutions. Indeed, as land use problems accelerate, Californians cannot afford to chase perfect planning models.

A county-based strategy suggests at least two possible tactics to achieve it. First, the Legislature might delegate the State's authority to its county boards of supervisors over "countywide affairs." The definition of countywide affairs could be left to the counties to define in their discretion. Alternatively, the Legislature could amend the Planning and Zoning Law specifically to authorize each of California's 58 counties to exercise the State's power over planning and land use controls.

The first approach appeals because counties are mandatory geographical subdivisions of the State,[548] so it makes sense that county boards of supervisors should be able to act as mini-Legislatures in regard to all land within their boundaries. According to the California Supreme Court, legislative matters can be classified into two, mutually exclusive types: "statewide concerns" and "municipal affairs."[549] Therefore, it would be of no moment to the State Constitution, or the courts, if the Legislature carved out "countywide concerns" from its "statewide concerns." Moreover, since statewide concerns include planning and zoning, the Legislature would be able to delegate those subjects to counties.[550]

548. *See supra* note 260.

549. Professor Peppin criticized the California Supreme Court for assuming in *Golden Gate Bridge & Highway Dist.*, 214 Cal. 308, and *Hinman*, 220 Cal. 578, that anything non-local must be a statewide concern. *See* PEPPIN IV, *supra* note 96, at 666-67. Peppin preferred the reasoning in *Henshaw*, *supra* note 266, 176 Cal. 507, in which the court held that a special district that subsumes several utilities each with the taxing power did not violate former Section 12 to Article XI, barring state imposed taxes for local purposes, because the new special district was dealing with "non-local" things. *See id.* Other scholars, namely Professors Sato and McEwen, disagreed with Peppin. *See* Sato, *"Municipal Affairs" in California*, *supra* note 132, at 1072-73; McEwen, *supra* note 1, at 438-39 n.43. The California Supreme Court takes Sato and McEwen's side, and the *Henshaw* approach is no longer the law. *See Bradley*, 4 Cal. 4th at 399-400.

550. *C.f. Ferran*, 50 Cal. App. 2d at 379 (city's ordinances have no extraterritorial effect without express permission of the sovereign power).

In 1967, Professor Arvo Van Alstyne suggested in his report to the Constitution Revision Commission that chartered counties should gain control over "county affairs," an analogue to chartered cities' superseding authority over their municipal affairs.[551] "County*wide* affairs" differ from Van Alstyne's proposal because they are not limited to unincorporated areas, but cover cities as well. Also, unlike municipal affairs whose definition is subject to unpredictable court decisions,[552] "countywide affairs" would be defined solely by the Legislature, whose intent would be dispositive.

This tactic could be hard to sell to voters that live in cities. Many Californians may not even realize that the Legislature sitting in Sacramento can preempt ordinances passed in their city halls. Creating "countywide affairs" would not impinge on cities' police powers any more than is already possible through State law. Nevertheless, voters may not trust county boards of supervisors with such preemptive power over their cities' ordinances. Indeed, if county boards are able to pass ordinances tailored to local needs and apply them to incorporated areas, one wonders what important policy issues would be left for city councils to address.

Therefore, the second alternative may be better. Through an amendment to the State Planning and Zoning Law, the Legislature could simply delegate its statewide concern in land use planning to each county, in 58 pieces corresponding to the counties' respective territories. This approach is sometimes called the "urban county" plan.[553]

Voters in Dade County, Florida, adopted such a plan in 1957.[554] Cities within that county, including Miami, did not merge into a consolidated city and county, nor did they surrender their legislative powers. Instead, Dade County can only preempt cities' legislative powers in the limited areas of transportation, health care, welfare relief, parks and recreation, public housing, redevelopment, air quality, flood protection, drainage, and economic promotion.[555]

551. *See* VAN ALSTYNE, *supra* note 43, at 169.

552. *See supra* part III.A.ii.b.

553. *See* SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA, *supra* note 10, at 65-70.

554. *See* SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA, *supra* note 10, at 67-68; *see generally* Feldman & Jassy, *supra* note 178, at 529-45.

555. *See* SCOTT & BOLLENS, GOVERNING A METROPOLITAN REGION: THE SAN FRANCISCO BAY AREA, *supra* note 10, at 67.

Florida, like California, is both high-growth and a Home-Rule state,[556] so there is no reason to think that the Dade County model is not transferable.[557] Still, if the Dade-County model seems too heavy-handed, California legislation need not assign planning duties completely to counties. Instead, the Legislature could require California counties to impose a consistency requirement on cities' land use plans and implementation measures.[558] The Cortese-Knox Act uses a similar approach in its delegation of the State's authority over local boundaries to LAFCOs.[559]

To make this second tactic work, the Legislature probably would have to allow counties to discipline cities by withholding planning-related funds and even imposing penalties for non-cooperation.[560] California's independently minded cities may be more willing to accept such discipline from their nearby county government than from a distant State body unfamiliar with local conditions,[561] including local political pressures. Naturally, no matter how the Legislature defines "countywide affairs," the State Constitution forbids even the State to legislate in the area of chartered cities' municipal affairs. Consequently, a county could not do so either without offending Home Rule. According to some, charter-based Home Rule makes the county "completely ineffective" in solving regional problems.[562] I disagree. By definition, regional problems cannot be municipal affairs in California.[563]

556. *See* John M. DeGrove, *Critical Area Programs in Florida: Creative Balancing of Growth and the Environment*, 34 J. URB. & CONTEMP. LAW 51, 52-53 (1988); Feldman & Jassy, *supra* note 177, at 560.

557. Non-transferability to California is the problem with several regional-governance models, like the Toronto, Ontario, and Portland, Oregon, models.

558. Professor Scott Bollens calls these "conjoint planning programs." *See* Scott A. Bollens, *State Growth Management: Intergovernmental Frameworks and Policy Objectives*, 58 J. AM. PLAN. ASS'N 454, 458 (1992).

559. *See supra* part I.C.ii.

560. This is how the Florida's Growth Management Act works. *See id.* at 458; *see also* John M. DeGrove, *Florida's Growth Management System: A Blueprint for the Future*, 14 FLA. ENVTL. & URB. ISSUES 1 (1986).

561. Here, I have in mind bodies like the State's Office of Housing and Community Development ("H.C.D."). The State Planning and Zoning Law provides that every city must submit its draft housing element to H.C.D. *See* Cal. Gov't Code § 65585(b) (West 1997). H.C.D. then reviews the draft element to determine if it "substantially complies" with the Housing Elements article. *See* Cal. Gov't Code § 65585(b), (d) (West 1997). If H.C.D. finds that the draft element does not substantially comply, then the legislative body that submitted it must either redraft the element to make it substantially comply, or include an explanation in its written findings explaining its reasons for believing that its draft element does substantially comply. *See* Cal. Gov't Code § 65585(f) (West 1997).

562. *See, e.g.*, Brunetti, *supra* note 1, at 1125.

563. *See supra* note 291.

Even if it were politically possible to amend the California Constitution to undo Home Rule, and it probably is not, the history of California's pre-Home Rule constitutional regime is not happy. The intent of county-based regional government is not to glorify counties but to solve regional problems. It does not require throwing out Home Rule with the dirty bath water of dysfunctional regional planning. Individual citizens can expect local government to be more solicitous of their concerns, because of both its proximity[564] and greater risk of legal liability.[565] It seems unwise to take that away.[566]

Moreover, imbuing counties with regional power is less likely to give credence to strong opposition from Home Rule proponents, or even to inspire it. This is especially so because California counties rarely comprise an entire metropolitan area.[567] In this context, newly energized county governments pose less of a threat to vested political interests. What is an apparent flaw for regional planning should be exploited to political advantage.

The details for implementing my two suggested tactics, including timing, are well beyond the scope of this article. I leave to the experts—lawyers, planning scholars and practitioners, regional economists, elected officials, political consultants, whomever—to determine the proper way to design and carry out a workable program to improve California regional planning. This article only seeks to suggest a strategy, not stipulate particulars.

564. "[T]he city is where the action is. It is the first line of government for most people. They feel their problems and frustrations where they live and work, and it is in their communities where people state their expectations and lodge their complaints." ALLAN B. JACOBS, MAKING CITY PLANNING WORK 316 (reprinted ed.,1995).

565. *See* LEAGUE OF CAL. CITIES, *supra* note 208, *Keynote Panel*, remarks of Prof. Kathleen M. Sullivan, Stanford Univ., and City Att'y Manuela Albuquerque, City of Berkeley; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1068-70 (1980).

566. *See Lynch*, 51 Cal. at 30 ("The advantage of having the home work done at home commends itself to every mind.").

567. The federal Census Bureau uses some California counties as Primary Metropolitan Statistical Areas ("P.M.S.A.s"): Shasta ("Redding"), Butte ("Chico-Paradise"), San Diego ("San Diego"), Kern ("Bakersfield"), San Luis Obispo ("San Luis Obispo-Atascadero-Paso Robles"), Santa Barbara ("Santa Barbara-Santa Maria-Lompoc"), Monterey ("Salinas"), Tulare ("Visalia-Tulare-Porterville"), Merced ("Merced"), Stanislaus ("Modesto"), and Stockton ("Stockton-Lodi"). *See* U.S. Dept. of Commerce, Bur. of Census, *California—Metropolitan Areas, Counties, and, Selected Areas*, COUNTY & CITY DATA BOOK, 1994, at C-5, C-7 (12th ed., Washington, D.C.: U.S. Gov't Print. Ofc., 1994). Obviously, the Census has had to simplify for statistical purposes.